POTENTIAL POSTAL PLEBISCITE ON SAME SEX MARRIAGE

JOINT OPINION

Introduction and Summary

1. We have been briefed by Allens Linklaters on behalf of its client the Human Rights Law Centre Ltd to provide an urgent written opinion on the following question:

> Does the Commonwealth have the power under the Australian Constitution to conduct a fee-for-service postal plebiscite on the same-sex marriage issue by contracting with, and paying money to, the Australian Electoral Commission (**AEC**)?

2. In our opinion, for the reasons set out in full below, the Commonwealth does not have the power to pay monies to the AEC for it to conduct a fee-for-service postal plebiscite absent any enabling legislation or regulation authorising the expenditure.

Background

3. We are instructed the relevant background is as follows.

4. In September 2016, the *Plebiscite (Same-Sex Marriage) Bill 2016* was introduced into the House of Representatives. The Bill proposed that voters be asked the question: *"Should the law be changed to allow same-sex couples to marry?"* The result of the plebiscite would have been non-binding and advisory only.

5. While the Bill was passed by the House of Representatives, it was defeated in the Senate on 7 November 2016.

6. Following the defeat of the *Plebiscite (Same-Sex Marriage) Bill 2016*, certain members of the Federal Government have proposed a voluntary 'postal plebiscite' as an alternative to conducting a compulsory national plebiscite.

7. Recent media reports indicate that some Members of Parliament consider that the postal plebiscite could be conducted absent any enabling legislation or regulation authorising the expenditure.

8. We note in this respect that in September 2015, Mr Paul Pirani, Chief Legal Officer at the AEC, told the Senate Legal and Constitutional Affairs Reference Committee that the AEC has the power to conduct a plebiscite on any non-referendum issue under s 7A of the *Commonwealth Electoral Act 1918* (Cth) (the ***Electoral Act***).

Assumptions

9. We make the following assumptions for the purposes of giving our opinion in relation to the proposed postal plebiscite:

   a. the Commonwealth will enter into a "fee-for-service" arrangement with the AEC under 7A of the Electoral Act;

   b. under that arrangement, the Commonwealth will pay monies directly to the AEC to conduct the plebiscite;

   c. the AEC will conduct the postal plebiscite in accordance with a "memorandum of understanding" (or other form of arrangement) with the Commonwealth, the terms of which will include that:

      i. the plebiscite is conducted by way of postal vote;

      ii. participation in the postal plebiscite is voluntary; and

      iii. the outcome is non-binding,

   d. prior to the postal plebiscite being held, no legislation is passed expressly authorising the expenditure of money by the Commonwealth on a fee-for-service postal plebiscite to be conducted by the AEC under s 7A (and no regulation is made authorising that expenditure under s 32B of the *Financial Management and Accountability Act 1997* (Cth)).

   (the **Postal Plebiscite**)

Nature of a plebiscite

10. The term "plebiscite" is commonly used to describe a non-binding popular ballot or vote on a policy issue.[1]

11. A plebiscite vote (whether conducted by post or not) has no status under the Constitution. In particular, it is to be distinguished from a referendum to alter the Constitution (see s 128 of the Constitution). As Professor Twomey has observed, the term "plebiscite" is used for votes by the people on other issues which do not cause a constitutional amendment.[2]

12. There are no restrictions on what question may be asked or the way in which the question is framed (for example, framed as requiring a "yes" or "no" answer or framed to elicit preferences among a variety of choices). Thus, for example, a question could be framed in relation to a general policy issue (such as *"should couples of the same-sex be permitted to marry in Australia?"*) rather than addressed to a particular proposal to amend legislation.

Plebiscites held in Australia

13. There is no federal precedent for a nation-wide plebiscite being conducted otherwise than supported by legislation. The three national plebiscites held to date have each been supported by legislation:

    a. The 1916 plebiscite on conscription was authorised by Parliament; namely, the *Military Service Referendum Act 1916* (Cth).

    b. The 1917 plebiscite on conscription was authorised by the *War Precautions (Military Service Referendum) Regulation 1917* (Cth), made purportedly pursuant to the *War Precautions Act 1914* (Cth).

    c. The 1977 plebiscite on the choice of a national song (which was conducted at the same time as the 1977 referendum) was authorised by the *Referendum (Constitution Alteration) Modification Act* 1977 (Cth), section 3, permitting the use of ballot boxes and polling booths for a poll for the purpose of choosing the tune for a national song.

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1 Kildea, P, *The Constitutional and Regulatory Dimensions of Plebiscites in Australia.* (2016) 27 PLR 290 at 292.

2 Twomey, A, *Constitutional Law: Plebiscites and Referenda,* (2015) 89 ALJ 832 at p 832.

Past fee-for-service ballots and postal plebiscites

14. When enacted in 1992, s 7A of the Electoral Act empowered the AEC to "provide goods or services to other organisations or to individuals" and was designed to facilitate services complementing the ordinary conduct of ballots (such as the provision of a 'roll scanning service' to State electoral authorities).[3]

15. In 1998, the text of s 7A(1) was amended to its current form. Since then, we are instructed that s 7A has been used primarily to enable the AEC to contract with public and private bodies to conduct small-scale ballots, including polls for trade unions and workplace agreement ballots.

16. Section 7A has only once been used to support a plebiscite. We are instructed that in 2007, the Commonwealth entered into an arrangement with the AEC to conduct a voluntary postal ballot of 85 local councils in Queensland, with the ballot question relating to amendments to Queensland local government legislation.

17. Prior to commissioning the 2007 ballot, sub-sections (1C), (1D) and (1E) of s 7A were amended to make it plain that conducting 'plebiscites' is an activity contemplated by s 7A(1) and to authorise the AEC to use information contained on the Roll for the purposes of conducting such a plebiscite (where the "Roll" is the roll of the electors for each State and for each Territory (s 81 Electoral Act)).

18. Beyond a valid appropriation, no further legislation was passed enabling the Commonwealth expenditure on the 2007 postal plebiscite. However, we note that the 2007 plebiscite was conducted before the High Court's decisions in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (***Pape***), *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 (***Williams # 1***) and *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 (***Williams # 2***).

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3 See Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1992, pages 386-7.

Role of the AEC in relation to a plebiscite under s 7A

19. On 21 August 1984, following amendments to the Electoral Act,[4] the AEC was established as a body by the Electoral Act to perform various functions permitted or required of it under the statute (ss 6, 7(1)).[5] Prior to that, the role of the AEC had been performed by a department within the Department of Home Affairs, commencing in 1902 (noting that, between 1972 to 1984, it was known as the Australian Electoral Office). As such, since 1984, the AEC has not been a "department of State".

20. Section 7A of the Electoral Act permits the AEC to "make arrangements for the supply of goods or services to any person or body". We note here that while a "*plebiscite* "is expressly contemplated as a service that may be provided by the AEC under s 7A(1), the term is not defined in the Act.

21. Section 7B provides that reasonable fees may be charged for goods or services supplied by the AEC under s 7A. Thus, this type of arrangement has been described as a "commercial ballot"; that is, a ballot process provided on a "fee-for-service" basis.[6]

22. There is no legislation in force setting out the terms upon which plebiscites may be held at the national level.

23. As such, the terms and conditions upon which the Postal Plebiscite would be undertaken by the AEC are not dictated by the terms of the Electoral Act.

24. Rather, the AEC would conduct the Postal Plebiscite in accordance with a "memorandum of understanding" (or form of arrangement) entered into with the Commonwealth (in the same way that a trade union or other private organisation would enter into such an arrangement with the AEC under s 7A(1)).

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4 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).

5 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [119] per Gummow and Hayne JJ; see *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [81] per Gummow and Bell JJ; *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [7] per French CJ and Bell J.

6 Kildea, P, *The Constitutional and Regulatory Dimensions of Plebiscites in Australia.* (2016) 27 PLR 290 at 299.

25. In this respect, while one would expect that a plebiscite conducted under s 7A would be passed by a majority of persons voting, that would be a matter for the memorandum of understanding or arrangement that set out the terms upon which the AEC would conduct the plebiscite.

Requirement for legislative authority unless within exceptions

26. While the AEC has the power to conduct a plebiscite on a fee-for-service basis under s 7A of the Electoral Act (subject to the usual qualifications on the exercise of statutory power), it does not follow that the Commonwealth necessarily has the power to pay the AEC to do so.

27. An appropriation of money, while a necessary condition on the Executive power to spend money, does not of itself authorise the spending of that money. This applies even if the purpose for the expenditure falls within one of the legislative competencies set out in s 51 of the Constitution.[7]

28. *Pape* and *Williams # 1* and #2 confirm that the Commonwealth needs a basis to expend money that has been legally appropriated. The bases identified in those cases are where such expenditure is:

    a. authorised by the Constitution; or

    b. made in the execution or maintenance of a statute, or expressly authorised by a statute; or

    c. made in accordance with the ordinary administration of the functions of government; or

    d. supported by a common law prerogative power; or

    e. (possibly) supported by the nationhood power.

29. Each of these categories is considered in turn below.

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7 See, *Pape*, at [62] per French CJ; and *Williams #1* at [4], [31], per French CJ, [138] per Gummow and Bell JJ, [544] per Crennan J.

A. Authorised by the Constitution

30. As noted above, it is now well settled that a valid appropriation pursuant to s 81 of the Constitution is insufficient of itself to support expenditure of that money.[8]

31. It is equally well settled that a source of federal legislative power does not provide the requisite authority for government expenditure absent legislation enacted pursuant to that power.[9]

32. When applied to the proposed Postal Plebiscite, this means that neither the earmarking of $170 million for a same-sex marriage plebiscite as part of the 2017-2018 budget,[10] nor the potential source of legislative power under s 51(xxi), is sufficient without more as authority for the proposed expenditure.

33. Thus, when we discuss in this section that such spending can occur if "authorised by the Constitution", this expressly excludes the above-mentioned concepts.

(i) First limb of s 61 of the Constitution

34. Spending is authorised by the Constitution (without the need for legislation) pursuant to s 61. The first limb of s 61 provides that the "executive power of the Commonwealth…extends to the execution and maintenance of this Constitution".[11]

35. In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230, Williams J stated as follows as regards this provision (citations omitted):

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8 *Pape* at 55 [111] (French CJ); 73-4 [178]-[183] (Gummow, Crennan and Bell JJ); 113 [320] Hayne and Kiefel JJ); 211 [602] (Heydon J).

9 See *Pape* at 40-41 [62] (French CJ); *Williams #1* at 179-189 [4] (French CJ); 233 [138] (Gummow and Bell JJ); 358 [544] (Crennan J); *Williams #2* at 455 [25] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

10 Budget Paper No. 1: *Budget Strategy and Outlook 2017-18* at p 9-11.

11 See A Twomey, "Post-*Williams* Expenditure – When can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?", (2014) 33(1) *University of Queensland Law Journal* 9 (***Twomey***) at 10, fn 5, citing *Williams #1* at [31] (French CJ); [193] (Hayne J) and [507] (Crennan J).

The execution of the Constitution in the section "means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation". The maintenance of the Constitution therefore means the protection and safeguarding of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation.

36. In *Wool Committee,*[12] it was said that the "execution of the Constitution" means the doing of something immediately prescribed or authorised by the Constitution without the intervention of Federal legislation. A practical application of the "execution" arm of this limb is that it "extends to the provision of what is necessary or convenient for the functioning of the Parliament provided that funds for that purpose are appropriated by the Parliament."[13] Viewed in that light, there seems to us no basis upon which to argue that the source of spending power for the Postal Plebiscite stems from the "execution" of the Constitution within the first limb of s 61.

37. Discussion of the "maintenance" of the Constitution aspect of s 61 is best left for to the later parts of this Opinion dealing with the unwritten or implicit Executive powers in the Constitution, and the prerogative[14] and nationhood powers.[15] Whether they provide a valid exception for spending on the Postal Plebiscite will be discussed in detail below.

(ii) Other provisions of the Constitution

38. The other aspect of expenditure "authorised by the Constitution" are those provisions of the Constitution which themselves directly authorise expenditure.[16] In *Williams #1,* Hayne J noted several of these provisions, namely, s 3 (Proclamation of Commonwealth, and appointment of Governor-General), ss 48 and 66 (payment of Members of Parliament and Ministers) and s 87 (Revenue from customs and excise duties to be applied by the

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12 *Commonwealth and Central Wool Committee v Colonial Combing* (**Wool Committee**) (1922) 31 CLR 421, 432.

13 G Winterton, "The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 *Adelaide Law Review* 21, 25 citing *Brown v West* (1990) 169 CLR 195, 201 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

14 G Winterton, "The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 *Adelaide Law Review* 21, 26.

15 See Jacobs J in *Victoria v Commonwealth* (*AAP Case*) (1975) 134 CLR 338, 405-6.

16 *Williams* #2 at 455 [25].

Commonwealth towards its expenditure, with the balance paid to the States).[17]

39. Members of the Court also discussed s 96, to varying ends,[18] which allows the Commonwealth Parliament to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

40. There also exists the power under s 64 to administer government departments. This will be addressed in section C below (under the heading "made in accordance with the ordinary administration of the functions of government").[19]

41. Another such power is contained in s 82, where, despite ss 81 and 83 being carved out as not providing a basis for valid spending by the government, s 82 mandates that the Consolidated Revenue Fund be applied to the payment of "costs, charges and expenses incident to its collection, management and receipt".

42. Upon a review of these provisions, in the legislative environment as it currently stands, in our opinion there appears no valid basis upon which to assert that expenditure for the proposed Postal Plebiscite is validly authorised by some provision of the Constitution.

(iii) Unwritten or implicit powers of the Commonwealth

43. In *Wool Committee* at 441, Isaacs J observed that "[t]he mere fact of the creation of the Executive Government carries with it some constitutional consequences, unwritten, it is true". Among the unwritten powers (or alternatively implicit in the concept of "maintenance" of the Constitution) is the power to conduct an executive inquiry,[20] including "for the purpose ... of informing the Legislature".[21]

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17 At 249 [193] fn 350.

18 Eg, *Williams # 1* at [143]-[148] (Gummow and Bell JJ); [243]-[247] (Hayne J); [501]-[503] (Crennan J).

19 See eg *Williams #1* at 211–12 [74] (French CJ).

20 See, eg, *Lane's Commentary on the Australian Constitution* at 315; *Church of Scientology v Woodward* (1982) 154 CLR 25 at 62; *R v Collins; Ex parte ACTU-Solo Enterprises* (1976) 8 ALR 691 at 694-695; *Lockwood v Commonwealth* (1954) 90 CLR 177 at 182 (***Lockwood***).

21 *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330 at 377 per O'Connor J. See also *Colonial Sugar Refining Co v Attorney General (Cth)* (1912) 15 CLR 182 (***Colonial Sugar***) at 205-206 per Barton J.

44. In *Colonial Sugar* at 194, Griffith CJ stressed the fact that "[i]t has been for a long time ... the practice of the Crown in all parts of the British Dominion to appoint Commissioners to make inquiry concerning certain matters as to which the Executive Government thinks it desirable that information should be collected to be made use of in the administration of the affairs of the country or for the guidance of Parliament."

45. In our view, the fact that executive inquiries of this kind were well established at the time of federation is important aspect of their constitutional legitimacy. This is part of the reason why inquiries by Royal Commission (or other more informal advisory committees or boards of inquiry) can be regarded as one of the "unwritten" consequences of establishing an executive government adverted to by Isaacs J in *Wool Committee*.

46. For the most part, the cases affirming a non-statutory power to conduct an executive inquiry are concerned with Royal Commissions of Inquiry or inquiries actually authorised by statute.[22] Fullagar J in *Lockwood* at 182 indicated that the only objection to an executive inquiry of a non-compulsive kind by the Commonwealth might be an objection under s 81 of the Constitution based on the application or expenditure of moneys on matters outside Commonwealth power. Following *Williams #1*, this objection assumes a much greater significance.[23]

47. Further, it is difficult to describe the Postal Plebiscite as an executive inquiry. It has very little in common with a Royal Commission of Inquiry or with other less formal advisory committees or boards of inquiry that have been established in the past. The conduct of the Postal Plebiscite necessarily involves reliance on specific statutory power under s 7A of the Electoral Act (although this does not itself authorise the spending of public money). The Postal Plebiscite cannot be conducted without engaging the AEC because access to the electoral Roll is needed to carry it out. We have not found any

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22 See the cases cited at fnn 20-21 above. See also *Clough v Leahy* (1904) 2 CLR 139 at 156-157; *Colonial Sugar Refining Co v Attorney General (Cth)* (1912) 15 CLR 182 (***Colonial Sugar***); *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 93-94; *The BLF Case* (1982) 152 CLR 25.

23 See, by analogy, the observation of Gummow and Bell JJ in *Williams #1* at [151] that, "[w]here public moneys are involved, questions of contractual capacity are to be regarded 'through different spectacles'."

precedent supporting an argument that an arrangement such as the Postal Plebiscite could be treated as an executive inquiry permissible without statutory authority.

48. In this respect, there is no such established convention in relation to holding nationwide polls or plebiscites and spending public money on them without statutory authority.

49. As we have observed above, the only three nationwide plebiscites that have been conducted since federation (in 1916, 1917 and 1977) all relied upon express statutory authority.[24] We are aware that the 2007 Queensland plebiscite appears to have been conducted using public Commonwealth money in purported reliance on s 7A of the Electoral Act without separate statutory authority. However, the Commonwealth's decision to spend public money on a Queensland plebiscite was prior to *Pape* and *Williams #1*, and was the subject of some criticism at the time. It does not provide a judicially-considered precedent, nor could it be described as demonstrating a convention or well-established practice.

50. It may be accepted that Commonwealth Departments routinely conduct, or engage third parties to conduct, opinion polls, focus groups and the like in order to gauge public opinion and inform the development of public policy. Those activities (to the extent they are conducted without statutory authority) are likely to be considered part of the "ordinary administration of the functions of government": see section C below. As with commissions of inquiry, the fact that they are part of a well-established practice or convention and are routine in nature (unlike the Postal Plebiscite) is important to their constitutional legitimacy.

51. Finally, as we explain in section D below, the Postal Plebiscite could not be regarded as an exercise of Crown prerogative power, precisely because of its novelty.

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24 *Military Service Referendum Act* 1916; *War Precautions (Military Service Referendum) Regulation* 1917; *Referendum (Constitution Alteration) Modification Act 1977.*

52. For these reasons, we do not think that any unexpressed or implicit executive power to conduct inquiries would enable the Commonwealth to spend public money on the Postal Plebiscite.

B. Expressly authorised by a Statute, or made in the execution or maintenance of a statute

(i) Expressly authorised by a Statute

53. There is no question that a validly enacted statute (that is, supported by a Commonwealth head of legislative power) that expressly provides for expenditure of appropriated money, validly confers upon the executive power to spend that money. A relevant example, was contained in the recently defeated *Plebiscite (Same-Sex Marriage) Bill 2016* (Cth). Assuming that s 51(xxi) provided a valid head of power for that proposed legislation, cl 40 of the Bill expressly provided that the "Consolidated Revenue Fund is appropriated for the purposes of…paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in relation to the plebiscite."

54. However, absent that Bill passing, nothing in the current *Marriage Act 1961* (Cth) provides this power.

55. Turning to the Electoral Act, ss 7A(1) and 7B, relevantly provide as follows, and will be set out in part for ease of reference:

> *7A Supply of goods and services*
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> *(1) Subject to this section, the Commission may make arrangements for the supply of goods or services to any person or body. The arrangements that may be made by the Commission include an arrangement under which an authorised person enters into an agreement, on behalf of the Commonwealth, for the supply of goods or services to a person or body. For this purpose, authorised person means a person who is authorised in writing by the Commission to enter into agreements under this subsection.*
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> …

7B Fees for goods and services

Unless otherwise provided by or under this Act or another Act, reasonable fees may be charged for goods or services supplied under section 7A.

56. Mr Paul Pirani, Chief Legal Officer at the AEC in 2015, suggested that it was possible for a plebiscite to be held without Parliament passing enabling legislation on the basis that pursuant to s 7A, the plebiscite could be conducted as a fee-for-service election.[25]

57. Thus, and as stated in the Assumptions set out above, the current proposal appears to be that the AEC will provide this "fee-for-service" pursuant to ss 7A and 7B of the Electoral Act. Implicit within the question we have been asked, is that there will be an expenditure or payment of money to the AEC in return for that service.

58. Neither ss 7A nor 7B is an express provision which authorise expenditure by the Commonwealth of appropriated funds to conduct a plebiscite. Section 7A provides only that the AEC may make arrangements for the supply of goods and services to any *person or body*, and both ss 7A and 7B are silent as to (if that *person or body* receiving the services is the Commonwealth) the Commonwealth's power to spend public monies on those goods or services.

59. A further source of statutory power which has been raised in the context of a Postal Plebiscite is the provision made within the *Appropriation Act (No 1) 2017-2018* (Cth) for an "Advance to the Finance Minister" in s 10. However, in our opinion, a review of this section shows that it has no applicability to the Postal Plebiscite on the facts with which we have been briefed. Section 10(1) provides that the "section applies if the Finance Minister is satisfied that there is an urgent need for expenditure" that has either not been provided for because of an erroneous omission or understatement, which is not applicable here, or "because the expenditure was unforeseen", which again, would be

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25 Senate Legal and Constitutional Affairs References Committee, *"Matters of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia"*, (September 2015) at [3.3].

difficult to justify given the provisional allocation of $170 million remained "unchanged".[26]

60. Finally, the use of the "contingency reserve" has been raised as a potential source of authority for expenditure. On our instructions, this forms part of the Budget but does not constitute statutory authority to spend monies. Rather, a separate appropriation is necessary. Accordingly, the inclusion of a contingency reserve in the Budget could not in our view provide the necessary statutory basis for expenditure of monies on the Postal Plebiscite.

(ii) Made in the execution or maintenance of a statute

61. A related exception exists pursuant to the second limb of s 61, namely, if the expenditure is made in the "execution and maintenance...of the laws of the Commonwealth."

62. In relation to this limb, in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230, Williams J stated as follows:

> *The execution and maintenance of the laws of the Commonwealth must mean the doing and the protection and safeguarding of something authorized by some law of the Commonwealth made under the Constitution.*

63. Similarly, in *Davis*,[27] Brennan J said that the "execution and maintenance of the laws of the Commonwealth" is a "a function characteristically to be performed by execution of statutory powers." In *New South Wales v Commonwealth*,[28] Barton J, dissenting in the result, equated "execute and maintain" with "enforce and uphold the laws of which they are the guardians".

64. *First*, a relevant consideration is whether the payment of funds by the Commonwealth to the AEC for the conduct of the Postal Plebiscite pursuant to s 7A meets the description of the "execution of the laws of the Commonwealth".

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26 Budget Paper No. 1: *Budget Strategy and Outlook 2017-18* at p 9-6.

27 *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

28 (1915) 20 CLR 54 at 72; see also *Williams #1* at [52].

65. In *Williams #1*, French CJ stated that "the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect."[29] As noted by Professor Twomey,[30]

> *It is not absolutely clear how far this goes, but it seems that if the Parliament has enacted a law that authorises some kind of program or outcome, then even if the statute does not expressly authorise the relevant expenditure, it may be enough that the expenditure is made in executing or maintaining the enacted law, as long as there is a valid appropriation.*

66. The Electoral Act as a whole primarily provides a framework setting out the relevant law relating to Parliamentary elections.[31] The AEC's powers in s 7A sit outside its core functions identified in s 7.

67. Section 7A does not in terms authorise the Commonwealth to expend monies for a Postal Plebiscite to be conducted by the AEC. As discussed above, ss 7A and 7B provide that a service may be provided, to a person or body, and that person or body could include a range of different entities including the Commonwealth, trade unions, or private organisations. Section 7A only provides the mechanism which empowers the AEC to make arrangements in order to provide the relevant good or service.

68. We are thus of the view that the "execution" or "maintenance" of the law could not extend to suggesting that ss 7A or 7B provide a source of power to the Commonwealth to expend funds to pay for the supply of the good or service arranged by the AEC. Though the bounds of the second limb of s 61 are unclear, it is unlikely that they go this far.

69. *Secondly*, in our opinion to interpret the second limb of s 61 as supporting a conclusion that the conduct of the Postal Plebiscite meets the description of the "execution or maintenance of" the Marriage Act, would again be going too far.

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29 At 191 [34].

30 Twomey, at 13-14.

31 See long title of Electoral Act; s 13(2)(a) of the *Acts Interpretation Act 1901* (Cth).

70. For example, we have considered whether the "maintenance" of the Marriage Act extends to ascertaining public opinion on whether or not it should be amended, as part of the "protection and safeguarding" of the notion of "marriage" already authorised by that Act.[32] However, we are of the view that paying monies for the conduct of the Postal Plebiscite could not be described as being in the execution or maintenance of the terms of the Marriage Act. The conduct of the Postal Plebiscite is an exercise designed to gauge public opinion as to whether the terms of the Marriage Act, as currently in effect, should be altered.[33] As such, it does not involve enforcing or upholding the current terms of the Marriage Act.

71. Finally, even described as an activity going to proposed law reform by obtaining information to inform the Parliament, the payment of monies for the Postal Plebiscite would not be "in the maintenance of the Constitution" itself for the reasons set out in Section A, above.

72. For these reasons, we do not think that the payment of monies by the Commonwealth for the Postal Plebiscite meets the description of being "expressly authorised by a Statute, or made in the execution or maintenance of a statute".

C. Made in accordance with the ordinary administration of the functions of government

73. As Twomey observes, while this exception was clearly accepted by the High Court in *Williams #1*, the basis for it was not clearly articulated, although it appears to be either implicit in section 64 of the Constitution, or to arise from the prerogative powers to establish and operate government departments and agencies, or from the status of the Crown as a legal person.[34] As we observe in section A above, we do not think the last of those grounds can, without more, justify the expenditure of public money after *Williams #1*.

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32 See definition of "marriage" within s 5, which "means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

33 See paragraph [65] above.

34 Twomey at 18-19.

74. Section 64 of the Constitution expressly contemplates the establishment and operation of Commonwealth departments. This has been held to authorise making such contracts "as might from time to time be necessary in the course of" administration.[35] In *New South Wales v Bardolph*,[36] the Commonwealth's power to enter into contracts was affirmed (and, by implication, spend public money on such contracts), but *Williams #1* stressed that this must be in the "ordinary course" or part of the "well-recognized functions" of administration.[37]

75. Following *Williams #1*, the reason why the Commonwealth is permitted to spend public money on ordinary administration is, in a sense, its ordinariness. That is why the Constitution does not require Parliament to authorise such expenditure specifically by legislation. This is reflected most clearly in Crennan J's reasoning that the chaplaincy program was not permitted because it had not been "subject to the parliamentary processes of scrutiny and debate which would have applied to special legislation".[38] The same is true of the Postal Plebiscite but is starker given a similar proposed plebiscite (albeit more expensive) was specifically considered and rejected by the Parliament.

76. Twomey observes that "no doubt the Commonwealth will seek to push the boundaries of what fall within" this power.[39] We can see how, for instance, an argument might be made that this power justifies spending public money on opinion polls of the kind commonly carried out by or on behalf of Departments (although it is not necessary to offer a concluded view on this). The constitutional validity of such expenditure must, one way or another, rest on the activities being "ordinary" or "well recognised".

77. The novelty and exceptional nature of the Postal Plebiscite, in our view, means it cannot be regarded as being an "ordinary" or "well recognised" expense of government, whatever the precise bounds of that concept may be.

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35 *Commonwealth v Colonial Combing Spinning and Weaving Co* (1922) 31 CLR 421 at 432.

36 (1934) 52 CLR 455.

37 *Williams #1* at [74]-[79], [207]-[208], [527]-[530].

38 *Williams #1* at [532].

39 Twomey at 22.

D. Supported by a common law prerogative power

78. Prerogative powers are those common law powers of the Crown which have been inherited and are properly attributable to the Commonwealth.[40] "Prerogative power" in this context is used in the strict/narrow sense, encompassing only those rights and capacities enjoyed by the Crown alone.[41] *Williams #1* involved a rejection of any notion that the non-statutory, non-prerogative capacity of the Executive Government of the Commonwealth is to be equated for all purposes with the capacity of an individual.[42] These powers are included within the executive power of the Commonwealth provided for in s 61.[43]

79. In this regard, as Twomey notes, "the prerogative is not the source of power for the exercise of the capacities of the Commonwealth on any subject whatsoever. Rather, it is only the source of power for the exercise of Commonwealth capacities in a manner that gives effect to those traditional prerogative powers that are uniquely attached to the Crown."[44]

80. Though the power to establish royal commissions of inquiry are part of the prerogatives of the Crown recognised by the common law,[45] the Crown prerogative specifically is to issue the "command", being the Royal Commission itself, and then the delegate of the Crown exercises his or her ordinary ability to ask questions and receive answers, then to inform the Executive of his or her conclusions.[46] As discussed above, however, the long line of cases supporting the Commonwealth's power to issue a Royal Commission for the purposes of inquiring into specified matters, whether in the exercise of its prerogative or otherwise, does not justify spending public money, following the reasoning in *Williams #1*.

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40 *Williams #1* at 179–80 [4], 216–17 [83] (French CJ), 356–7 [539] (Crennan J).

41 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [133] per Gageler J

42 *Williams #1* at [38], [154]-[155], [204], [518]-[524], [595], as cited by Gageler J in *Plaintiff M68* at [145].

43 eg *Cadia Holdings Pty Ltd v NSW* (2010) 242 CLR 195, [86] (Gummow, Hayne, Heydon and Crennan JJ).

44 Twomey at 16.

45 *McGuinness v Attorney General (Vic)* (1940) 63 CLR 73 at 93-94 per Dixon J

46 *BLF Case* (1982) 152 CLR 25 at 68 (Stephens J).

81. A list of prerogatives identified by the British Government does not identify conducting a plebiscite, or a poll, opinion or survey as a known category of prerogative.[47] In any event, in *Williams #2*, the Court categorically rejected the "false assumption" that "the executive power of the Commonwealth is the *same* as British executive power"[48] (emphasis in original). As such, if the power to conduct a plebiscite is not a prerogative power that was known to the British Government, given the prerogative powers were inherited,[49] it is certainly not one that will be recognised within s 61 here.

82. Accordingly, in our opinion, this exception would not provide the source of power for expenditure on the Postal Plebiscite.

E. Supported by the nationhood power

83. As stated above, a source of the "nationhood power" as espoused by Jacobs J in the *AAP Case*, was that "[w]ithin the words 'maintenance of this Constitution' appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world".[50]

84. The preferred test, however, for what constitutes the substance of the "nationhood" power,[51] seems to be that stated by Mason J in *Victoria v Commonwealth* (*AAP Case*).[52] In that case, his Honour said:

> *there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51 (xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.*

85. In *Pape*, a majority of the Court held that the power conferred by s 61 allowed for the expenditure of money which had been appropriated, and that the

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47 See UK, Ministry of Justice, *Review of Executive Royal Prerogative Powers: Final Report*, (2009) 31-4, cited in Twomey at 16, fn 44.

48 At 467-9 [77]-[83].

49 *BBC v Johns* [1965] Ch 32, 79 (Diplock J).

50 At 405-6.

51 *Williams # 2* at 454 [23].

52 (1975) 134 CLR 338, 397. As cited in *Pape* at 63–4 [133] (French CJ), 91 [241] (Gummow, Crennan and Bell JJ). See also *Davis v Commonwealth* (1988) 166 CLR 79, 93–5 (Mason CJ, Deane and Gaudron JJ), 110 (Brennan J).

legislative power conferred by s 51(xxxix) supported the statute which had been enacted that regulated the expenditure of the appropriation, seemingly on the basis of the nationhood power, without stating so in such express terms.[53]

86. Other cases in which this power has been relied upon have included the incorporation of a company to organise the commemoration of Australia's bicentenary,[54] and matters which are said to fall within the ambit of the power include national symbols such as the flag and national anthem, and the creation of national institutions such as museums, art galleries and scientific research institutes.[55]

87. By contrast, in *Williams #1*, all members of the Court held that the nationhood power did not support the expenditure absent legislative authority.[56]

88. As has been noted elsewhere, "the facts were clearly distinguishable from the circumstances in *Pape*, where there had been a need for immediate fiscal action by the national government due to the global financial crisis; here there was no 'natural disaster or national economic or other emergency'."[57] French CJ was similarly confined in his application of the power to the circumstances and facts of that case.[58]

89. A mere "benefit" alone will not suffice.[59] In any event, as noted by Winterton, "[o]pinions may justifiably differ as to whether a particular activity must be conducted by the Commonwealth if the nation is to derive benefit, and opinions will also differ on the question whether activities are to Australia's benefit or detriment."[60] From a review of the recent media of the issue of a

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53 At 23-4 [8]-[9] (French CJ), 92 [243] (Gummow, Crennan and Bell JJ).

54 *Davis* (1988) 166 CLR 79.

55 See P Kildea, "The Constitutional and Regulatory Dimensions of Plebiscites in Australia", (2016) 27 *Public Law Review* 290, 298, fn 63 citing *Davis* (1988) 166 CLR 79, 111 (Brennan J).

56 At 441–2 [83] (French CJ), 456 [146] (Gummow and Bell JJ), 480–1 [240] (Hayne J), 520 [402] (Heydon J), 542 [503] (Crennan J), 562 [594] (Kiefel J).

57 S Chordia, A Lynch and G Williams, "Case note: *Williams v Commonwealth* – Commonwealth Executive Power and Australian Federalism", (2013) 37 *Melbourne University Law Review* 189 at 199, citing *Williams # 1* at 456 [146] (Gummow and Bell JJ).

58 *Pape* at 23 [8].

59 *Williams #2* p 466 [71].

60 G Winterton, "The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 *Adelaide Law Review* 21, 28.

same-sex marriage plebiscite, whatever its form, it is clear that there are differing opinions as to whether the conducting of a plebiscite on this issue is an activity which is of benefit to the nation.

90. We note the fact that the AEC, as the holder of relevant voting records and information, can undertake such a plebiscite on a national scale, a capacity which the States do not readily have.[61]

91. However, in our view it is doubtful that the argument that the plebiscite would be better administered at a national level for the sake of convenience would be sufficient to trigger the nationhood power.[62] Crennan J said as much in *Williams #1*, noting that something more is required for it to be rendered one of "truly national endeavour" or "pre-eminently the business and concern of the Commonwealth as the national government."[63]

92. In *Williams #2*, the Court responded as follows to a submission by the Commonwealth that it had the executive power to contract and spend in relation to "all those matters that are reasonably capable of being seen as of national benefit or concern":

> *So expressed, the proposition is one of great width. It may go so far as to permit the expenditure of public money for any national program which the Parliament reasonably considered to be of benefit to the nation. It is hard to think of any program requiring the expenditure of public money appropriated by the Parliament which the Parliament would not consider to be of benefit to the nation. In effect, then, the submission is one which, if accepted, may commit to the Parliament the judgment of what is and what is not within the spending power of the Commonwealth, even if, as the Commonwealth parties submitted, the question could be litigated in this Court. It is but another way of putting the Commonwealth's oft-repeated submission that the Executive has*

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61 See eg *Davis* (1988) 166 CLR 79, 93-94 (Mason CJ, Deane and Gaudron JJ), 111 (Brennan J); *Pape* at 60 [127] (French CJ); 90-91 [239] (Gummow, Crennan and Bell JJ).

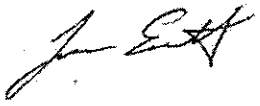
62 *Williams #2* at 464–5 [65] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also S Chordia, A Lynch and G Williams, "Case note: *Williams v Commonwealth [No 2]* – Commonwealth Executive Power and Spending After *Williams [No 2]*", (2015) 39 *Melbourne University Law Review* 306 at 328.

63 At 348 [504].

unlimited power to spend appropriated moneys for the purposes identified by the appropriation.[64]

93. On the basis of the authorities set out above, in our opinion the better view is that the nationhood power is not a valid source for expenditure by the Commonwealth on the Postal Plebiscite.

94. We advise accordingly.



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64 *Williams* #2 p 466 [71] per French CJ, Hayne, Kiefel, Bell and Keane JJ.