Case Note

Responsible Government and Parliamentary Intention: The Impact of *Wilkie v Commonwealth*

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Abstract

In *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance*, the High Court of Australia upheld the validity of the arrangements through which the Australian Government conducted a postal survey on the question of whether same-sex marriage should be legalised. These arrangements involved the use of a power available to the Finance Minister in the *Appropriation Act (No 1) 2017–2018* (Cth) to allocate a prescribed amount of money for certain purposes if a number of preconditions are satisfied. At first, the case appeared to one of straightforward statutory interpretation. However, the Court's decision has broader implications for understanding the capacity of the executive arm of government to spend public funds. The Court's reasoning appears to undermine prior High Court authority in relation to the issue of executive spending and responsible government. It is argued that the interpretation of the powers available to the Finance Minister to spend public moneys should be revisited in the context of these authorities.

I Introduction

On 8 December 2017, the Commonwealth Parliament enacted the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), legalising marriage in Australia between same-sex partners. The enactment of this legislation followed a national postal survey designed to gauge the views of electors on whether Australia's existing marriage laws ought to be amended. Given the social and political significance of this legislation, and the celebrations that accompanied its passing, one might be forgiven for forgetting the cases brought before the High Court of Australia to challenge the Australian Government's authority to conduct the survey: *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance*.[1] Despite not attracting significant public attention, one commentator has noted that '[t]he real complexity of *Wilkie*, and its precedential significance, is revealed by what the Court did not say, and by analysing the decision in the trajectory of High Court jurisprudence about appropriations and public expenditure more generally'.[2] This

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1 (2017) 263 CLR 487 ('*Wilkie*').

2 Michael Wait, 'The Appropriation Power and the Same Sex Marriage Postal Survey: *Wilkie v Commonwealth*' (Speech, 2018 UNSW Constitutional Law Conference and Dinner, Sydney,

case note explores three issues stemming from the Court's decision in *Wilkie*. Following a brief outline of the Court's decision, Part II examines the practical impact of *Wilkie* on the Government's ability to spend public funds. It is argued that the case creates an avenue for the Executive to fund policies and programmes in a manner that undermines the will of Parliament. Part III compares *Wilkie* with earlier High Court authorities on executive spending. It argues that the Court's analysis undermines the importance accorded to the principle of responsible government in these authorities when it comes to questions of executive spending. In light of these arguments, Part IV argues for the continued exercise of judicial scrutiny in this area to limit the abuse of the Executive's power to spend.

II The Case

A *Background*

In 2015, the Australian Government announced that, if re-elected, it would hold a plebiscite to gauge the views of electors on the question of whether marriage between same-sex partners should be legalised. Following its successful re-election, the Government drafted the Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) ('Plebiscite Bill'), which passed the House of Representatives in October 2016.[3] However, the Bill was subsequently defeated in the Senate in November 2016,[4] and again in August 2017.[5] If it was to deliver on its election promise, the Government had to find another way to survey the views of the Australian public.

In a move described as 'ingenious',[6] the Government abandoned its attempts to conduct a plebiscite by way of new legislation, instead drawing on existing statutory provisions to conduct a postal survey. On 9 August 2017,[7] the Treasurer issued a direction under s 9(1)(b) of the *Census and Statistics Act 1905* (Cth) to the Australian Statistician to collect statistical information about 'the proportion of participating electors who are in favour of [or against] the law being changed to allow same-sex couples to marry'.[8] The Government also drew on s 16A of the *Australian Bureau of Statistics Act 1975* (Cth) and s 7A(1) of the *Commonwealth Electoral Act 1918* (Cth). These enabled the Australian Bureau of Statistics ('ABS') to collaborate with the Australian Electoral Commission ('AEC') to implement the *Treasurer's Direction* by carrying out a postal survey.[9]

However, insufficient funding had been allocated to the ABS under sch 1 of the *Appropriation Act (No 1) 2017–2018* (Cth) ('*Appropriation Act*'). In order to

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23 February 2018) <http://thebox.unsw.edu.au/video/2018-unsw-constitutional-law-conference-session-2> 00:49:30–01:10:30.

3 *Wilkie* (n 1) 509 [8].

4 Ibid.

5 Ibid 514 [27].

6 Anne Twomey, '*Wilkie v Commonwealth*: A Retreat to *Combet* over the Bones of *Pape*, *Williams*, and Responsible Government' on *AUSPUBLAW* (Blog Post, 27 November 2017) <https://auspublaw.org/2017/11/wilkie-v-commonwealth/>.

7 *Wilkie* (n 1) 514 [28].

8 *Census and Statistics (Statistical Information) Direction 2017* (Cth) s (3)(1)(b)–(c) ('*Treasurer's Direction*').

9 *Wilkie* (n 1) 519 [44]–[45].

conduct the survey, the ABS would need an injection of additional funds. Crucially, cl 40 of the Plebiscite Bill would have had the effect of appropriating funds from the Consolidated Revenue Fund ('CRF') for the purpose of conducting the plebiscite. However, as noted above, the Bill, and thus the appropriation of funds for that purpose, was twice rejected by the Senate. Notwithstanding this specific rejection, the Government was able to finance the survey through a provision known as the Advance to the Finance Minister ('AFM'), contained in s 10 of the *Appropriation Act*. Schedule 1 of the *Appropriation Act* sets out as 'items' the services for which money is appropriated. If certain preconditions are satisfied, the AFM enables the Finance Minister to make a determination under s 10(2), which has the effect of allocating up to $295 million to an item specified in sch 1. On 9 August 2017, the Finance Minister made a determination in accordance with s 10(2), allocating $122 million to the ABS.[10] The ABS was thus provided with the necessary funds to carry out the *Treasurer's Direction*.

B *The Challenge*

The following day, proceedings were commenced in the High Court of Australia challenging the Government's actions on a number of grounds.[11] The four grounds that survived to judgment were as follows:

1. Section 10 of the *Appropriation Act* impermissibly delegated Parliament's power of appropriation to the Finance Minister;[12]
2. If the first ground failed, the Finance Minister's determination was not authorised by s 10 because the preconditions required before the determination could be made did not exist;[13]
3. The *Treasurer's Direction* exceeded the power given by s 9(1)(b) of the *Census and Statistics Act 1905* (Cth);[14] and
4. The AEC's functions under the *Commonwealth Electoral Act 1918* (Cth) did not extend to assisting the ABS to conduct the postal survey.[15]

Sidelining the questions of standing raised by the proceedings,[16] a unanimous Court dismissed these submissions.[17] The third and fourth grounds were briefly dismissed,[18] and are not the focus of this case note. The remainder of this Part will therefore only deal with the Court's responses to the first and second grounds.

According to the first submission, by permitting the Finance Minister to allocate funds to the services specified in sch 1 of the *Appropriation Act*, Parliament

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10 Minister for Finance (Cth), *Advance to the Finance Minister Determination [No 1 of 2017–2018]*, 9 August 2017, item 1.

11 Andrew Damien Wilkie, Felicity Jennifer Marlowe and PFLAG Brisbane Inc, 'Plaintiffs' Annotated Submissions', Submission in *Wilkie v Commonwealth*, M105/2017, 23 August 2017, 2–20 [12]–[86] ('*Plaintiffs' Submissions*'); Commonwealth of Australia et al, 'Submissions of the First to Third Defendants', Submission in *Wilkie v Commonwealth*, M105/2017, 30 August 2017, 4–20 [16]–[82].

12 *Wilkie* (n 1) 526 [72].

13 Ibid 532 [96].

14 Ibid 544 [140].

15 Ibid 546 [149].

16 Ibid 522 [59].

17 Ibid 522 [58].

18 Ibid 544–6 [139]–[148] (ground three), 546–7 [149]–[150] (ground four).

had abdicated its power under ss 81 and 83 of the *Australia Constitution*. Section 81 provides that:

> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*.

Section 83 provides that '[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law'. These sections embody the fundamental principle of responsible government 'that no money can be taken out of the consolidated Fund … excepting under a distinct authorization from Parliament itself'.[19] The plaintiffs submitted that the effect of this principle, and the requirement in s 83 that an appropriation be made 'by law', means that it is impermissible for an appropriation to be made by subordinate legislation.[20] Section 10 of the *Appropriation Act*, it was argued, permitted the appropriation of funds by 'executive fiat'.[21]

The Court held this argument was 'based on a fundamental misconstruction'.[22] The power to make a determination under s 10(2) was not a power to appropriate funds; the funds available under s 10(3) were already appropriated by s 12 when the *Appropriation Act* commenced operation.[23] This interpretation is consistent with previous commentary on the AFM.[24] However, in response to a submission that the AFM failed to comply with the constitutional requirement that an appropriation must be for a legislatively determined purpose,[25] the Court noted that 'the degree of specificity of the purpose of an appropriation is for Parliament to determine'.[26] This comment evokes an earlier statement made by the Court in *Combet v Commonwealth*.[27] That decision has been subject to academic criticism on the basis that it undermined responsible government by eroding parliamentary scrutiny of legislation.[28] The Court's acknowledgement of this statement in *Wilkie* puts to rest doubts previously expressed about the validity of the AFM on the basis that it does not comply with the requirement that there can be no appropriation 'merely

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19 *Brown v West* (1990) 169 CLR 195, 205, 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), quoting *Auckland Harbour Board v The King* [1924] AC 318, 326 (Viscount Haldane).

20 *Plaintiffs' Submissions* (n 11) 5 [24], citing *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 23 [8], 45 [81], 55 [111] (French CJ), 82 [209] (Gummow, Crennan and Bell JJ) ('*Pape*'); *Brown v West* (n 19) 205; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 580 (Brennan J), 599 (McHugh J) ('*Northern Suburbs*').

21 *Plaintiffs' Submissions* (n 11) 5 [24].

22 *Wilkie* (n 1) 530 [87].

23 Ibid 530–1 [88].

24 Senate Legal and Constitutional References Committee, Parliament of Australia, *Payment of a Minister's Legal Costs* (Parliamentary Paper No 184 of 1995, 1995) 42 [3.54].

25 *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 253 (Latham CJ) ('*Pharmaceutical Benefits Case*').

26 *Wilkie* (n 1) 532 [91].

27 (2005) 224 CLR 494, 522 [5] (Gleeson CJ), 577 [160] (Gummow, Hayne, Callinan and Heydon JJ) ('*Combet*').

28 Geoffrey Lindell, 'The *Combet Case* and the Appropriation of Taxpayers' Funds for Political Advertising — An Erosion of Fundamental Principles?' (2007) 66(3) *Australian Journal of Public Administration* 307; Graeme Orr and William Isdale, 'Responsible Government, Federalism and the School Chaplaincy Case: God's Okay, it's Mammon that's Troublesome' (2013) 38(1) *Alternative Law Journal* 3, 6.

authorizing expenditure with no reference to purpose'.[29] However, as discussed below, the High Court's reasoning, insofar as it has implications for parliamentary control over executive spending, arguably marks a divergence of approach (if not direct authority) from the case law in this area that has developed following the decision in *Combet*.

In the event that its first submission was unsuccessful, the plaintiffs argued that the Finance Minister's determination was invalid because it failed to comply with the requirements set out in s 10(1) of the *Appropriation Act*. Before a determination under s 10(2) can be made, the Minister must be satisfied that:

(1) there is a *need* for expenditure that is not provided for, or is insufficiently provided for in sch 1;[30]
(2) that need for expenditure is *urgent*;[31] and
(3) the expenditure was not provided for, or was insufficiently provided for because it was *unforeseen* until after the last day on which it was practicable to provide for it in the Bill for the *Appropriation Act* before that Bill was introduced into the House of Representatives.[32]

The plaintiffs argued that these elements were not satisfied.

The High Court dismissed this argument by construing each element in turn. First, the Court noted that 'need' simply refers to 'expenditure which ought to occur, whether for legal or practical or other reasons'.[33] It rejected a submission that the need should 'arise from some source external to Government'.[34] Second, the Court held that, in context, the term 'urgent' merely required the Minister to consider why the expenditure could not be delayed until it could be included in either Appropriation Bills No 3 or No 5.[35] The Court rejected the suggestion that the Minister must consider whether it would be reasonable or practicable for the Government to introduce a Bill for special appropriation for consideration by Parliament.[36] Finally, the Court held that what must be 'unforeseen' is the specific payments to be made: '[t]he question is not whether some other expenditure directed to achieving the same or a similar result might have been foreseen'.[37]

Bringing these factors together, the High Court held as follows:

(1) the ABS *needed* the $122 million to conduct a postal survey to comply with the *Treasurer's Direction*;[38]

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29 *Pharmaceutical Benefits Case* (n 25) 253 (Latham CJ). See Enid Campbell, 'Parliamentary Appropriations' (1971) 4(1) *Adelaide Law Review* 145, 156; Geoffrey Lindell, 'Parliamentary Appropriations and the Funding of the Federal Government's Pre-Election Advertising in 1998' (1999) 2(2) *Constitutional Law and Policy Review* 21, 23; *Northern Suburbs* (n 20) 600 (McHugh J).
30 *Appropriation Act* s 10(1).
31 Ibid.
32 Ibid s 10(1)(b).
33 *Wilkie* (n 1) 537 [111].
34 Ibid 537 [112].
35 Ibid 537–8 [113].
36 Ibid 538 [114].
37 Ibid 539 [120].
38 Ibid 542–3 [133]. Chronologically, the Finance Minister's determination was, in fact, made before the *Treasurer's Direction*.

(2) that need was *urgent* because the Government had imposed a deadline on knowing the results of the survey by 15 November 2017;[39] and
(3) $122 million was not allocated to the ABS in sch 1 to conduct the postal survey because that expenditure was *unforeseen* as at 5 May 2017, which was the last day on which the Bill containing sch 1 could have included that expenditure.[40]

Thus, the plaintiffs' second ground failed.

III Legislative Intention: The Impact of *Wilkie*

The immediate relevance of the High Court's decision in *Wilkie* will be as much a matter of political importance as it will be of legal precedent. As discussed below, it allows the Executive to manufacture the conditions in which expenditure under the AFM and its future equivalents is justified. The Court's interpretation of s 10(1) of the *Appropriation Act* thus subverts the intention of Parliament in enacting the AFM. Of course, given recent High Court jurisprudence on the concept of legislative intention,[41] it may be imprecise to speak of Parliament, as a collective body, having an 'intention' capable of being subverted. The Court has stated that judicial findings as to the intention of Parliament in enacting a piece of legislation are 'an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.[42] The intention of Parliament is thus a conclusion about a statute that is reached by courts adopting and applying principles of interpretation that have been accepted 'as legitimate in a representative democracy' between the different arms of government.[43] However, even on this understanding, the Court's construction of s 10 is arguably inconsistent with these principles of interpretation.

A *The Requirement of Necessity*

As noted above, the High Court interpreted the requirement of 'need' as confined to an inquiry as to whether expenditure '*ought to occur*'.[44] This was distinguished from expenditure that is 'critical or imperative'.[45] The Court noted that to set the bar that high 'would tend to render the other considerations of which the Finance Minister

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39 Ibid.
40 Ibid.
41 See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'); *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) ('*Zheng*'); Joseph Campbell and Richard Campbell, 'Why Statutory Interpretation is Done as it is Done' (2014) 39(1) *Australian Bar Review* 1, 20–5; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39; Jim South, 'Are Legislative Intentions Real?' (2014) 40(3) *Monash University Law Review* 853.
42 *Zheng* (n 41) 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 8–9.
43 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–11 [430] (French J) ('*NAAV*'), citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 (Gaudron J); *Zheng* (n 41) 455 [28].
44 *Wilkie* (n 1) 537 [111] (emphasis added).
45 Ibid.

must be satisfied contradictory, not complementary'.[46] However, in its attempts to avoid this consequence, the Court's interpretation of 'need' arguably renders this requirement almost completely otiose. The Minister's power in s 10(2) of the *Appropriation Act* is enlivened on the basis of a subjective assessment of the facts, as the Minister must be satisfied that the elements in s 10(1) are met.[47] This satisfaction must, of course, be reasonable and reached through a correct understanding of the law.[48] There is no suggestion that the Court's interpretation of 'need' has subverted this procedural element of the test in s 10(2). However, by merely requiring the Minister to be satisfied of what 'ought to occur', the Court has construed the word 'need' such that it effectively imposes no substantive limitation on the Minister's power. It is difficult to envisage, for example, a situation in which a Finance Minister would not consider a policy promoted by their own party to be something that 'ought to occur'.

The High Court's interpretation pays insufficient attention to the centrality of purpose as a principle of statutory construction. The plaintiffs in *Wilkie* submitted that the 'need' in question should arise from a source external to government.[49] Wait has characterised this submission as 'sensible',[50] as otherwise the Government would be able to manufacture a need for its own policy. The Court's rejection of this limitation is, in one sense, understandable on the bases that it preserves the Government's ability to respond to both internal and external needs and that, in any event, it is somewhat artificial to distinguish between needs arising from sources internal and external to government.[51] However, this was not the only constructional option available to the High Court. In recent times, the Court has placed increasing importance on 'constructional choice' as a principle of statutory interpretation,[52] which finds expression in s 15AA of the *Acts Interpretation Act 1901* (Cth).[53] That section provides that 'the interpretation [of a statutory provision] that would best achieve the purpose or object of the Act … is to be preferred to each other interpretation'.[54] The search for statutory purpose forms an important part of a court's approach to discerning legislative intention.[55]

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46 Ibid.

47 Ibid 533 [98], citing *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 599 [39] (Gageler J).

48 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651–4 [130]–[137] (Gummow J); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), cited in *Wilkie* (n 1) 537 [109].

49 *Wilkie* (n 1) 537 [112].

50 Wait (n 2).

51 *Wilkie* (n 1) 537 [112].

52 *Momcilvoic v The Queen* (2011) 245 CLR 1, 50 [50] (French CJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [38]–[40] (Gageler J) ('*SZTAL*'); *Coverdale v West Coast Council* (2016) 259 CLR 164, 172–3 [22]–[23] (French CJ, Kiefel, Keane, Nettle and Gordon JJ).

53 Gordon Brysland and Suna Rizalar, 'Statutory Interpretation: Constructional Choice' (2018) 92(2) *Australian Law Journal* 81, 84.

54 *Acts Interpretation Act 1901* (Cth) s 15AA.

55 See *Lacey* (n 41) 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *NAAV* (n 43) 410–11 [430] (French J).

In construing the meaning of 'need', the Court in *Wilkie* referred to a 1988 Parliamentary Committee report on the AFM.[56] It was noted in a submission to that report that:

> The [AFM] commits to the Minister … the power to form an opinion that particular expenditure meets the requirements set out in [a prior equivalent of s 10(1)]. … However, the Minister is not free to form any opinion he pleases. His opinion must be not unreasonable and it must be formed having regard to relevant considerations — including the correct legal meaning of the expressions 'urgently required' [as the provision then provided] and 'unforeseen' …[57]

In addressing this concern, the Committee noted that '[i]t is clear from this advice that there are constraints to giving approval to applications for funds from the AFM and that the Minister does not have a wide-ranging discretion'.[58] Thus, although the Committee considered that the AFM would allow a government a sufficient 'level of flexibility to enable [it] … to meet contingencies',[59] at least some substantive limitation was contemplated by the words chosen. The interpretation of that limitation need not have been informed by the origin of the need — that is, whether or not the need arose from a source external to government. As the Court noted, there was nothing pointed to by the plaintiffs in the context or history of the AFM that warranted such a construction.[60]

However, two points are to be borne in mind in construing the word 'need' in s 10(1) of the *Appropriation Act*. The first is that 'need' appears in s 10(1) prefaced by the adjective 'urgent' (the High Court's interpretation of this term is also discussed separately below in Part IIIB). As noted above, the Court refrained from interpreting 'need' as referring to spending that was 'critical or imperative'.[61] But the use of the adjective 'urgent' gives the need for expenditure a temporal quality that suggests the obligation it expresses exists at a particularly high level. Second, the word 'ought' admits of a greater variety of meanings than 'need'. Used as a noun, 'need' refers to a 'case or instance in which some necessity or want exists; a requirement',[62] or, elsewhere, a 'necessity, requirement'.[63] The word 'ought' is a modal verb,[64] and the strength of the obligation it expresses appears to vary. For instance, it is defined in one source as 'to be bound in duty or moral obligation',[65] whereas another defines it as 'that which *should* be done, the obligatory'.[66] The spectrum of meaning that 'ought' appears to occupy can be expressed as, on the one hand, something being desirable or recommended and, on the other, something being required or essential. Admittedly, the latter end of the spectrum reflects a meaning

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56 Joint Committee of Public Accounts, Parliament of Australia, *Advance to the Finance Minister* (Report 289, 1988).
57 Ibid 36, quoted (in part) in *Wilkie* (n 1) 535 [103].
58 Joint Committee of Public Accounts (n 56) 11 [2.33].
59 Standing Committee on Finance and Public Administration, Parliament of Australia, *Transparency and Accountability of Commonwealth Public Funding Expenditure* (2007) 35 [4.24].
60 *Wilkie* (n 1) 537 [112].
61 Ibid 537 [111].
62 *Macquarie Dictionary* (online at 27 September 2019) 'need' (def 1).
63 *Oxford English Dictionary* (online at 12 October 2019) 'need' (def 1).
64 See MAK Halliday, *Halliday's Introduction to Functional Grammar* (Routledge, 4th ed, 2014) 695–6.
65 *Macquarie Dictionary* (online at 12 October 2019) 'ought' (def 1).
66 *Oxford English Dictionary* (online at 12 October 2019) 'ought' (def 1) (emphasis added).

closer to need. However, the fact that the word exists on a spectrum arguably grants the Minister a power to adopt a meaning of the word 'ought' that imposes no substantive limitation. By construing 'need' as imposing no substantive limitation, the Court neglected to seriously consider constructions better reflecting the purpose of the AFM. In doing so, it is difficult to conclude that the High Court's construction of 'need' adequately reflects the intention of the legislature in enacting the AFM.

B *The Requirement of Urgency*

A similar point may be made with respect to the High Court's interpretation of 'urgent'. The Court interpreted the requirement for expenditure to be 'urgent' as being limited to an inquiry into whether the expenditure could or could not await inclusion in a later appropriation Act. In contrast, it has been suggested by a Parliamentary Committee that use of the AFM 'should be restricted to cases of genuine urgency',[67] contemplating events such as 'natural disasters'.[68] In contrast, the Committee did not consider the payment of a Minister's legal bills 'prior to specific approval by the Parliament of such a payment' to be sufficiently 'urgent' for use of the AFM.[69] In 2007, a Standing Committee remarked that '[a]n advance from the AFM is only issued if it is the last available legal source of funding.'[70] It was partly on this understanding that the Committee subsequently commented that the AFM is 'now much less significant as a source of funds than in the past'.[71] It is clear that an understanding of at least some members of the Parliament in the past has been that the level of urgency required to justify use of the AFM is more than urgency in the context of the regular enactment of appropriation Acts.

This Committee commentary did not influence the High Court in *Wilkie*. The Court rejected the plaintiffs' submission that the Minister should consider whether it would be practicable to introduce a Bill to appropriate the necessary funds, rather than relying on the AFM,[72] noting:

> The history of the use of the [AFM], at least since 1957, contradicts [this submission]. Were needed expenditure to exceed the amount of the [AFM], the Government would have no option but to introduce a Bill for a further appropriation outside the ordinary sequence of annual Appropriation Acts. Where needed expenditure does not exceed the amount of the [AFM], that amount is already immediately available to meet the expenditure provided only that the precondition in s 10(1) is met. That is the reason the amount — specified in s 10(3) — was appropriated in the first place.[73]

As Twomey has observed, the Court's reliance on the history of the AFM's use is puzzling: '[i]t is hard to see … that past abuse of the requirement for urgent necessity should justify present abuse of the requirement. Past practice cannot undo

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67 Senate Legal and Constitutional References Committee (n 24) 40 [3.47].
68 Ibid.
69 Ibid.
70 Standing Committee on Finance and Public Administration (n 59) 34 [4.17].
71 Ibid 35 [4.23].
72 *Wilkie* (n 1) 538 [114].
73 Ibid.

illegality or correct jurisdictional error.'[74] Furthermore, the suggestion that the amount appropriated by s 10(3) carries weight for the purposes of construing the term 'urgent' is debatable. The Court's reasoning is based on the proposition that if the preconditions in s 10(1) are met, it is irrelevant whether or not it is 'practicable to seek a special appropriation from the Parliament'.[75] However, it is clear from the plaintiffs' written submissions that their argument was intended to give content to the meaning of 'urgent' in s 10(1), not to consider whether, even if s 10(1) *was satisfied*, it would nevertheless be practicable for Parliament to pass legislation instead of using the AFM.[76] That is, the plaintiffs argued that if it was practicable to seek an appropriation from Parliament, then the expenditure in question would not be relevantly 'urgent'.

In rejecting this argument, the High Court paid insufficient attention to statutory purpose. As the Court noted, urgency 'is a relative concept'.[77] In the context of statutory interpretation, this renders 'urgent' a term that is 'insufficiently precise to provide definitive guidance as to how [it] is to be understood and applied in [a] particular statutory setting'.[78] Such terms give rise to a constructional choice, and 'integral to making such a choice is discernment of statutory purpose'.[79] It is unlikely that the qualifier of urgency would have been attached to the requirement of need if it was intended to permit the Government to spend money on a particular matter 'simply because the government decides it should be dealt with before the next scheduled Appropriation Act'.[80] Rather, it is evident from the inclusion of these requirements that some substantive limit was intended to be imposed on use of the AFM. Indeed, the Committee's reference to a need for a 'genuine urgency'[81] may reflect an understanding that situations of confected crisis would not satisfy the conditions for the Minister to exercise his or her power. This understanding is reinforced by the fact that the Standing Committee suggested that the AFM was considered to be a less significant source of funds than others available to the Government.[82] Furthermore, under the Government's own guidelines, 'an urgent need for expenditure is expenditure that is required within two weeks'.[83] Although such guidelines cannot constrain the Minister's discretion,[84] that does not mean that, in addition to parliamentary reports, they could not inform the Court's understanding of the purpose of s 10(1).[85]

Wilkie will permit successive governments to manufacture conditions to pursue their own policies, irrespective of the will of Parliament. This is evident from the facts of *Wilkie*. In setting up the postal survey, the Government indicated that

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74 Anne Twomey, 'A Tale of Two Cases: *Wilkie v Commonwealth* and *Re Canavan*' (2018) 92(1) *Australian Law Journal* 17, 19.
75 *Plaintiffs' Submissions* (n 11), 11 [47].
76 Ibid.
77 *Wilkie* (n 1) 537 [113].
78 *SZTAL* (n 52) 375 [40] (Gageler J).
79 Ibid 375 [39].
80 Twomey (n 74) 18–19.
81 Senate Legal and Constitutional References Committee (n 24) 40 [3.47].
82 Standing Committee on Finance and Public Administration (n 59) 35 [4.23].
83 Explanatory Memorandum, Appropriation Bill (No 1) 2008–2009 (Cth) 15 [54].
84 *Wilkie* (n 1) 538 [115].
85 See *Acts Interpretation Act 1901* (Cth) s 15AB.

'the final result of the voluntary postal plebiscite is to be known no later than 15 November 2017'.[86] This deadline was self-imposed and it was, at best, unclear whether there would be any consequences if the Government failed to know the results of the survey by this date. However, according to the High Court, this was sufficient indication that the Finance Minister was satisfied the expenditure was urgent.[87] Additionally, assuming a government is able to find the necessary powers in existing legislation, *Wilkie* will also enable the Executive to bypass parliamentary approval of appropriations for purposes to which the Parliament has refused to assent. The Court's reasoning thus appears to confirm comparisons that have been made between the AFM and the United Kingdom Contingency Fund, the latter of which has been criticised on the grounds that it 'is as effective a method of by-passing prior parliamentary sanction of expenditure as could be imagined … [giving] the Executive substantial freedom from prior parliamentary scrutiny of its policy decisions'.[88]

IV Executive Spending and Responsible Government

Beyond these immediate consequences, *Wilkie* has deeper ramifications for the principle of responsible government. Early responses to the Court's decision have argued that it amounts to a retreat from earlier jurisprudence on executive spending.[89] To understand the impact of *Wilkie* in this context, it is necessary to consider two important cases: *Pape*,[90] and *Williams v Commonwealth*.[91]

Both these cases altered earlier understandings of the nature of appropriations and Commonwealth executive power. Prior to 2009, and although there were contrary opinions,[92] a 'long held' view was that s 81 of the *Australian Constitution* allowed the Commonwealth to spend money appropriated from the CRF.[93] However, in *Pape*, the High Court held that s 81 confers no such power; s 81 only enables Parliament to authorise the appropriation of money from the CRF. Any subsequent expenditure must be validly supported by another law.[94] Thus, 'it is now settled that [ss 81 and 83 of the *Australian Constitution*] … do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the *Constitution* or the laws of the Commonwealth'.[95]

Williams involved a similar reversal of previously accepted understandings of the nature of executive power. Prior to that case, it had been assumed that

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86 *Wilkie* (n 1) 516 [32].
87 Ibid 542 [133].
88 Gordon Reid, *The Politics of Financial Control: The Role of the House of Commons* (Hutchinson, 1966) 82, quoted in Campbell (n 29) 152; Lindell (n 29) 24.
89 Twomey (n 74) 19; Twomey (n 6); Wait (n 2).
90 *Pape* (n 20).
91 (2012) 248 CLR 156 ('*Williams*').
92 *Northern Suburbs* (n 20) 601 (McHugh J).
93 James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 384.
94 *Pape* (n 20) 55 [111] (French CJ), 74 [183] (Gummow, Crennan and Bell JJ), 104 [292], 105 [296] (Hayne and Kiefel JJ), 210–12 [601]–[604] (Heydon J).
95 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 [41] (French CJ, Gummow and Crennan JJ).

> the executive power of the Commonwealth included a power to do what the Commonwealth legislature could authorise the Executive to do by enacting legislation, whether or not the Commonwealth legislature had actually enacted the legislation.[96]

This 'common assumption' was rejected in *Williams*.[97]

On its face, *Wilkie* does not appear to be directly inconsistent with these prior decisions. As the High Court upheld the validity of the legislation used to implement the postal vote, there was no question of the Executive's spending lacking legislative support. Moreover, following *Combet*, the Court held that the AFM was not an appropriation 'in blank',[98] because 'the degree of specificity of the purpose of an appropriation is for Parliament to determine'.[99] As Wait has noted, if Parliament is satisfied with the terms of the appropriation of the AFM, this is not inconsistent with ss 81 and 83 of the *Australian Constitution*, or with responsible government, because 'it is for Parliament to dictate the level of scrutiny required'.[100] This view appears arguable, as the principle espoused in *Combet* was accepted as accurate in *Pape*.[101]

However, this argument belies the principles underpinning the reasoning in *Pape*. In *Combet*, a majority of the High Court held that, although an appropriation must be for a purpose, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[102] In *Pape*, Gummow, Crennan and Bell JJ referred to this statement as giving rise to the consequence that 'the description given to items of appropriation provides an insufficient textual basis for the determination of issues of constitutional fact and for the treatment of s 81 as a criterion of legislative validity'.[103] This consequence was said to add additional support to the conclusion that s 81 did not give rise to a legislative spending power.[104] Their Honours' reference to *Combet* was not, then, a simple acknowledgement of the view that responsible government requires only formal parliamentary scrutiny of legislation. Rather, the practical consequences flowing from *Combet* were relied upon as justifying, in support of responsible government, the separation of the power of appropriation from the power of spending.

This reasoning may be contrasted with the High Court's treatment of responsible government in *Wilkie*. In *Wilkie*, the Court relied on the above statement from *Combet* as legitimising the terms of the appropriation of the AFM and, by extension, the Government's subsequent use of the AFM.[105] However, the

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96 *Williams* (n 91) 295 [340]. See also *Williams* (n 91) 295–313 [341]–[385] (Heydon J); Geoffrey Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2013) 39(2) *Monash University Law Review* 348, 355; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 493.

97 *Williams* (n 91) 205 [60] (French CJ), 232 [134]–[136] (Gummow and Bell JJ), 351–2 [516] (Crennan J).

98 *Pharmaceutical Benefits Case* (n 25) 253 (Latham CJ).

99 *Wilkie* (n 1) 532 [91].

100 Wait (n 2).

101 *Pape* (n 20) 78 [197] (Gummow, Crennan and Bell JJ).

102 *Combet* (n 27) 577 [160] (Gummow, Hayne, Callinan and Heydon JJ), citing *Pharmaceutical Benefits Case* (n 25) 253 (Latham CJ). See also *Combet* (n 27) 522 [5] (Gleeson CJ).

103 *Pape* (n 20) 78 [197], citing *Victoria v Commonwealth* (1975) 134 CLR 338, 411 (Jacobs J).

104 *Pape* (n 20) 78 [197]. See also *Williams* (n 91) 261 [222] (Hayne J).

105 *Wilkie* (n 1) 531–2 [91].

Government's attempts to enact legislation — and, crucially, to appropriate funds — to carry out a plebiscite had already twice been rejected by the Senate. Thus, *Combet* was used by the Court to support an odd proposition: the Government's use of the AFM to give effect to its policy was valid on the basis that Parliament had assented to that use, despite the fact that the Parliament had twice rejected spending on that specific policy and the appropriation of funds underpinning it. This result, while perhaps not inconsistent at the level of legal precedent, sits uneasily alongside the *Pape* majority's approach to the role of responsible government in controlling executive spending.

In *Williams*, the High Court placed importance on the role of the Senate in reviewing legislation as a basis for undermining the common assumption. Justice Crennan explained that '[t]he principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend'.[106] Thus, one reason for doubting the 'common assumption' was said to be that if the Executive were able to engage Parliament only at the stage of appropriation, then Parliament's role would be frustrated, for it would be excluded from 'the formulation, amendment or termination of any programme for the spending of … moneys'.[107] In other words, allowing executive expenditure on matters over which Parliament had legislative competence would allow the Executive to bypass the process of legislative scrutiny. Further, as Stellios has noted,

> [t]he House of Representatives is dominated by the executive, the appropriation process provides no effective control and, if *prior* parliamentary scrutiny of spending were limited to the appropriation process, then the Senate, as a House of Parliament, would have a limited role to control the executive-dominated House of Representatives ...[108]

In contrast, *Wilkie* removed the Parliament's — and especially the Senate's — capacity to scrutinise the purpose of the expenditure. As the High Court acknowledged in *Commonwealth v Australian Capital Territory*,[109] the Parliament has the legislative power to legalise same-sex marriage. Further, the Parliament's legislative power to enact the Plebiscite Bill, which was twice rejected by the Senate, was never challenged. By effectively enabling the Executive not only to bypass Parliament's competence over these matters, but to subvert its will in rejecting such a Bill, *Wilkie* undermines the importance accorded to responsible government in *Williams*. It was precisely this kind of use of the AFM that prompted a Senate Committee to comment in 1995:

> The importance of the principle that all expenditure by the Executive should first be approved by way of an appropriation is so fundamental that it should not be undermined by a provision which, if interpreted broadly, could give a carte blanche to a Minister to make payments without the express approval of Parliament for the *particular purpose of the payments*.[110]

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106 *Williams* (n 91) 351–2 [516] (Crennan J).
107 Ibid 235 [145] (Gummow and Bell JJ).
108 Stellios (n 93) 397 (emphasis in original).
109 (2013) 250 CLR 441, 461 [33], 462 [37], cited in *Wilkie* (n 1) 508 [4].
110 Senate Legal and Constitutional References Committee (n 24) 40 [3.46] (emphasis added).

The fact that *Wilkie* is formally consistent with *Pape* and *Williams* should not divert attention from the fact that it entails a departure from the underlying spirit of the High Court's reasoning in those cases.

V Judicial Oversight of Executive Expenditure

Wilkie weakens parliamentary oversight of executive spending. In light of the decision, it has been remarked that '[i]t may be that there will not be many more challenges to the expenditure of public moneys'.[111] This reflects a sentiment that responsible government is offered sufficient protection by the precedents established in *Pape* and *Williams*. However, as argued above, such a view adopts too narrow a focus on what the High Court decided in those cases.

Some years prior to his appointment as a Justice of the High Court, Gageler set out his 'vision' of the structure and function of the *Australian Constitution*. Relevantly, that vision contained a particular conceptualisation of the role of the federal judiciary. In light of the issues raised by *Wilkie* — particularly the potential of the decision to undermine parliamentary control of executive spending — this latter aspect of Gageler's vision is worth considering:

> You start with the notion that the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.[112]

As Gageler notes,

> [t]his will not give you the answer to a particular case … But it can give you a framework for understanding at a very broad level why a great deal of modern constitutional doctrine might take the form that it does and how aspects of that doctrine might possibly develop in the future'.[113]

Gageler's vision is a useful framework for understanding trends in the Judiciary's approach to constitutional cases where the issue to be decided engages questions of political accountability. Indeed, he points to a number of areas where judicial deference has given way to judicial vigilance. Two particular areas of constitutional law raised by Gageler are worth mentioning here. The first area is the jurisprudence that has been developed by the High Court regarding the implied freedom of political communication. This is an area of constitutional law where the Court continues to exercise a fairly high degree of judicial vigilance, leading some

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111 Robert French AC, 'Executive Power in Australia — Nurtured and Bound in Anxiety' (2018) 43(2) *University of Western Australia Law Review* 16, 41.

112 Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 152.

113 Ibid.

members of the Court to develop a strict test that must be undertaken where an exercise of legislative power burdens the freedom.[114] Gageler comments in relation to the implied freedom generally:

> A government which relies for the constitutional legitimacy of an exercise of legislative power on political accountability to the people of Australia cannot, in Sir Maurice's language, be allowed to commit a 'fraud on the power'. It is the crucial function of the judicial power to ensure that does not occur.[115]

The second area concerns the power of the legislature to alter the franchise 'in the face of the requirement of ss 7 and 24 of the *Constitution* that Senators and members of the House of Representatives be "directly chosen by the people"'.[116] Both these areas concern the accountability of Parliament to the Australian people. However, the exercise of judicial vigilance is not limited only to cases involving accountability of the Parliament to the people. Indeed, a third example of this trend towards judicial vigilance where political accountability is weak has arguably developed, as discussed earlier, in cases involving the accountability of the Executive to the legislature such as *Pape* and *Williams*.

The identification of this area as one in which judicial vigilance ought to be exercised thus offers the basis of an alternative or revised approach to the construction of future AFM provisions. Three further points may be raised in support of this view. First, as discussed in Part III, *Wilkie* has revealed a gap in the system of executive accountability to Parliament. Even where the Parliament has seen fit to reject a particular piece of legislation, the effect of *Wilkie* is that there is no inconsistency at the level of legal precedent with this fact and the subsequent use of the AFM to give effect to the same policy that was rejected by Parliament. The suggestion that this is somehow the product of parliamentary acquiescence evidences Parliament's inability to exercise adequate control over the Executive in this area. Second, the fact that Parliament has seen fit to prescribe some degree of constraint on the Minister being able to make a determination under s 10(2) ought not be circumvented. To proffer a liberal construction in favour of one that accords the words substantive effect cannot be explained as 'judicial deference where … political accountability is inherently strong',[117] as such a construction inherently undermines political accountability.

The final reason offered here as justifying judicial vigilance in relation to use of the AFM relates to practical aspects of Australian political institutions. As Mantziaris writes:

> Even though it does not always control the Senate, the executive nevertheless dominates the Parliament and directs most exercises of the legislative power. This allows the executive to control the choice of its own legal form and, by extension, the manner in which it will be accountable to Parliament.[118]

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[114] See *Brown v Tasmania* (2017) 261 CLR 328, 364 (Kiefel CJ, Bell and Keane JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 (French CJ, Kiefel, Bell and Keane JJ).

[115] Gageler (n 112) 155.

[116] Ibid.

[117] Ibid 152.

[118] Christos Mantziaris, 'The Executive: A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 125, 130.

The Senate's lack of power vis-à-vis the Executive-controlled lower House was an important factor underlying the reasoning in *Williams*.[119] The majority judges were willing to intervene where it was clear that the actions of the Executive were inherently capable of subverting existing channels of parliamentary scrutiny.[120] For Gummow and Bell JJ, the fact that the Senate would only play a limited role if the High Court gave effect to the 'common assumption' was a significant justification for doubting its existence.[121] In the context of the AFM, Lawson has observed that the fact that determinations made under s 10(2) are not disallowable instruments limits 'the opportunity for Parliament to prevent the anticipated expenditure'.[122] This argument can be put more strongly in light of *Wilkie*, as the Court's decision demonstrates the Senate's total incapacity to intervene in a determination made under the AFM. While not necessarily exhaustive, these points demonstrate a reasonable basis for expecting judicial scrutiny of the use of the AFM to ensure the accountability of government to the legislature, and to bolster the constitutional importance placed on responsible government in *Pape* and *Williams*.

VI Conclusion

Wilkie raises fundamental questions as to the appropriate relationship between the Parliament, the Executive and the Judiciary. The decision has the potential to allow the Executive to circumvent parliamentary scrutiny over its use of public funds. It also raises questions as to its consistency with earlier authorities on the topic of executive expenditure. Whereas responsible government has, in the past, played an important role in influencing the High Court's approach to questions of executive accountability to Parliament, *Wilkie* may suggest that the Court sees no further role for responsible government to play in this context. Despite this, there are good reasons for thinking that the Judiciary still has a strong role to play in ensuring the Government is not able to bypass or subvert ordinary channels of parliamentary scrutiny. As Sir Maurice Byers once observed, responsible government 'springs from and is moulded by what has been done, by what is being done and by what is likely to be acceptably done'.[123] It is not inherently inimical, or even unusual that the Court should be willing to assert 'judicial authority to examine and, if necessary, control wider and wider areas of executive authority'[124] in defence of responsible government.[125]

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119 *Williams* (n 91) 205–6 [61] (French CJ), 232–3 [136], 235 [145] (Gummow and Bell JJ).

120 Orr and Isdale (n 28) 5; Amanda Sapienza, 'Comments: Using Representative Government to Bypass Representative Government' (2012) 23(3) *Public Law Review* 161, 162.

121 *Williams* (n 91) 235 [145].

122 Charles Lawson, 'Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32(3) *Melbourne University Law Review* 879, 909.

123 Sir Maurice Byers, 'The *Australian Constitution* and Responsible Government' (1985) 1(3) *Australian Bar Review* 233, 233.

124 Ibid 237.

125 For a recent case, albeit one decided in a different jurisdiction, demonstrating the central role of the judiciary in defending responsible government and the role of Parliament, see *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] 4 All ER 299.