IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY **NO C 12 OF 2018**

On Appeal From the Administrative Appeals Tribunal

BETWEEN: **COMCARE**

Appellant

AND: **MICHAELA BANERJI**

Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PARTS II INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant (**Comcare**).

PART III ISSUES PRESENTED BY THE APPEAL

3. This is an appeal from a decision by the Administrative Appeals Tribunal (**Tribunal**) that a decision to terminate the Respondent's employment pursuant to ss 13(11) and 15(1) (**the relevant provisions**) of the *Public Service Act 1999* (Cth) (**PS Act**) was not 'reasonable administrative action taken in a reasonable manner' within the meaning of s 5A(2)(d) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**). The basis of the Tribunal's decision was that the decision to terminate the Respondent's employment 'unacceptably trespassed on the implied freedom of political communication'.[1]

4. The central issue in the appeal concerns the analysis to be applied when a discretionary administrative decision is said impermissibly to burden the implied freedom of political communication.[2] The Commonwealth contends that in such a case the question is always whether the legislation that purports to confer power to make the decision (as opposed to the decision itself) is valid by reference to the test identified in *Lange v Australian Broadcasting Corporation*,[3] as modified and refined in *Coleman v Power*,[4] *McCloy v New South Wales*[5] and *Brown v Tasmania* (***Lange/McCloy* test**).[6] If the legislation is valid when assessed against that test, the constitutional inquiry ends and 'any complaint respecting the exercise of power thereunder in a given case … does not raise a constitutional question, as distinct from a question of the exercise of statutory power.'[7]

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1 *Banerji v Comcare (Compensation)* [2018] AATA 892 at [128] (**Reasons**) (**CAB 64**).
2 See generally Stellios, '*Marbury v Madison*: Constitutional limitations and statutory discretions' (2016) 42 *Australian Bar Review* 324.
3 (1997) 189 CLR 520 at 561-562 (the Court) (***Lange***).
4 (2004) 220 CLR 1.
5 (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ) (***McCloy***).
6 (2017) 261 CLR 328 at 359 [88], 364 [104] (Kiefel CJ, Bell and Keane JJ), 375-76 [156] (Gageler J), 413 [271] (Nettle J), 432-433 [319]-[325] (Gordon J) (***Brown***).
7 *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (***Wotton***); *Brown* (2017) 261 CLR 328 at 443 [356], 459 [408] (Gordon J).

5. However, where legislation confers a discretion or power that is 'susceptible of exercise'[8] in accordance with the implied freedom, but the legislation itself does not ensure that the discretion or power will be exercised only in that way (as it very often will, as a result of preconditions that limit the circumstances in which the power is enlivened, express or implied limits on the purpose for which the power can be exercised, mandatory relevant or irrelevant considerations, or some combination thereof) then further analysis is required in applying the *Lange/McCloy* test. For laws of that kind, the magnitude of any burden on political communication and/or the justification for imposing that burden might vary widely depending on the decision that is made in any specific case. Such laws are valid, but identification of the boundary of the statutory power requires consideration of the constitutional test, because in such cases the statutory and constitutional limits of power align.[9]

6. The way that boundary is identified will vary with the statutory context. But it will not generally require the application of all the steps in the *Lange/McCloy* analysis to each exercise of power under the statute (those steps having been applied to the statute itself). For example, if the purpose of a statute is compatible with the maintenance of representative and responsible government, no decision authorised by that statute could ever be invalid on the basis of the 'compatibility' limb of the *Lange/McCloy* test. However, when addressing a challenge to a provision of the kind identified in the previous paragraph (but not otherwise), it may be necessary for the constitutional analysis to be completed at the level of the particular exercise of discretionary power. This is most likely to be necessary if a broadly framed discretion purports to authorise decisions that result in a burden on political communication that cannot be justified by the purposes of the statute. In such cases, the constitutional analysis is completed by asking whether, if the statute were to authorise burdens on political communication of the nature and extent of that resulting from the exercise of power in question, that would be disproportionate to what can reasonably be justified in pursuit of the statutory purpose. If so, the provision conferring the discretion is valid, but the impugned

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8 *Wotton* (2012) 246 CLR 1 at 14 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

9 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614 (***Miller***); *Wotton* (2012) 246 CLR 1 at 9-10 [10], 13-14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Sportsbet v NSW* (2012) 249 CLR 298 at 316 [12] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Wainohu v NSW* (2011) 243 CLR 181 at 231 [113] (Gummow, Hayne, Crennan and Bell JJ), 220 [72] (French CJ and Kiefel J relevantly agreeing) (***Wainohu***).

exercise of power is *ultra vires*, because the general words of the statute are construed as not authorising decisions that unjustifiably burden political communication.

7. The above framework applies as follows in the present case.

8. Question 1: Are ss 13(11) and 15(1) consistent with the implied freedom? The Commonwealth's primary submission is that ss 13(11) and 15(1) of the PS Act are valid in all of their operations. That analysis is focussed upon s 13(11), as it is that provision which burdens political communication (the relevant communications being restricted irrespective of the sanction that may be imposed if the norm of conduct created by s 13(11) is breached). While s 13(11), read with s 10(1)(a), burdens political communication, the extent of that burden is sensitive to context, and its purpose is compatible with (and enhances and protects) representative and responsible government, as it assists to preserve the effectiveness and integrity of the permanent professional public service by which the government carries out its executive functions. Section 13(11) is suitable, as it is rationally capable of advancing that purpose. It is also necessary, there being no evident obvious and compelling practical alternative. Finally s 13(11) is adequate in its balance, particularly having regard to the importance of its purpose (as is illustrated by its history). It follows that any burden on political communication arising from s 13(11) is consistent with the implied freedom of political communication.

9. Alternatively, if (contrary to the argument summarised at [8]) the nature and extent of the burden depends in part upon the severity of the sanctions that may be imposed under s 15(1), it remains the case that the relevant provisions are valid. That is because the statute (properly construed) requires that any sanction under s 15(1) be proportionate to the breach of s 13(11). Those statutory constraints 'import' a requirement of proportionality into the decision making process,[10] which is sufficient to ensure that the scheme as a whole remains within constitutional limits.

10. Question 2: do ss 13 and 15 confer a statutory discretion that is susceptible of exercise consistently with the implied freedom? If the Court rejects each of the arguments summarised at [8] to [9] above, such that questions *do* arise as regards the discretionary powers conferred by the scheme, the Commonwealth makes the alternative submission

[10] *Wotton* (2012) 246 CLR 1 at 34 [91] (Kiefel J).

that the discretion in s 15(1) is 'susceptible of exercise' consistently with the implied freedom and was so exercised in this case.

11. Question 3: 'reasonable administrative action taken in a reasonable manner'. On the basis of either Ground 1 or Ground 2, and having regard to the limited basis on which the decision was challenged, the Tribunal should have found that the decision to terminate the Respondent's employment was authorised by ss 13(11) and 15 of the PS Act, was lawful, and was 'reasonable administrative action taken in a reasonable manner' within s 5A(2)(d) of the SRC Act.[11]

Background[12]

12. The Respondent commenced employment with the Department of Immigration on 29 May 2006. Between that date and 19 July 2012, she posted tweets on Twitter, under the twitter handle 'LaLegale'. That Twitter handle did not state the Respondent's name, but did include other identifying information.[13] Following complaints by employees, a delegate of the Department carried out an investigation into whether the Respondent had breached 'the APS Code of Conduct' (**Code**) in s 13 of the PS Act. The delegate determined that the Respondent had breached s 13(1), (7) and (11) of the Code (the decision resting 'substantially' on s 13(11))[14], and that her employment should be terminated under s 15(1)(a) of the PS Act.

13. On 18 October 2013, the Respondent submitted a claim for compensation under s 14 of the SRC Act. The claim was refused on the basis that the termination was 'reasonable administrative action' within the meaning of s 5A of the SRC Act, and that decision was affirmed on internal review. The Respondent appealed to the Tribunal. The parties agreed that the only issue before the Tribunal was whether or not that decision involved a breach of the implied freedom of political communication. The Tribunal decided that 'the act of termination unacceptably trespassed on the implied freedom of political communication' and that it followed that 'the act of termination was unlawful, and ipso facto cannot be reasonable administrative action.'[15]

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[11] See Reasons at [3(38)], [5]-[7], [128] (**CAB 11-12, 64**).

[12] Except where otherwise identified, these facts are taken from [3] of the Reasons (**CAB 7**), which reproduces the Statement of Facts and Issues before the Tribunal.

[13] Complaint by Mr Logan against Applicant, 9 May 2012 (**Book of Further Materials at 17**).

[14] Reasons at [123] (**CAB 62**).

[15] Reasons at [128] (**CAB 64**).

14. Comcare appealed to the Federal Court on three questions of law, which have been removed into this Court. Questions 1 and 2 are addressed below. The answers to these questions resolve Question 3, as set out above at [11].

Question 1: Are ss 13(11) and 15 consistent with the implied freedom?

15. The implied freedom is a well-established constitutional implication arising from ss 7, 24, 62, 64 and 128 of the Constitution. The emphasis given in *Lange* to the provisions of the Constitution providing for both representative *and* responsible ministerial government strongly suggests that other aspects of Ch II are relevant to the application of the implied freedom in the context of the Australian Public Service (**APS**). Sections 64 (dealing with the establishment of departments of State) and 67 (dealing with the appointment and removal of the 'other' officers of the Executive Government who serve within those Departments and other Commonwealth agencies) confirm that the APS is an integral part of the system of government that the Constitution mandates. The primary duty of the APS is to serve the government of the day, and in doing so to serve Parliament (to which the Executive is accountable) and ultimately the people (to whom Parliament is accountable).[16] Thus, the regulation of the public service has a public interest aspect in a constitutional sense, insofar as public service legislation 'provides for the marshalling of human machinery to implement the exercise of executive power constitutionally vested in the Crown – and hence facilitates government carrying into effect its constitutional obligation to act in the public interest'.[17] Section 44(iv) of the Constitution likewise supports the significance of an apolitical public service by providing that a person who holds an office of profit under the Crown is incapable of being chosen or of sitting in the Federal Parliament.[18] It replicates United Kingdom provisions excluding public servants from 'active and public participation in party politics' and in that way has 'played an important part in the development of the old tradition of a politically neutral public service'.[19]

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16 *Lange* (1997) 189 CLR 520 at 561 (the Court).

17 *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24G, cited with approval in *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 180-181 [34] (Gummow, Kirby, Hayne and Kiefel JJ).

18 See the debate around the explanation for exempting officers and members of the naval and military forces from s 44 disqualifications: *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 754-755.

19 *Sykes v Cleary* (1992) 176 CLR 77 at 96 (Mason CJ, Toohey and McHugh JJ), quoted in *Re Lambie* (2018) 351 ALR 559 at 566 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

16. The implication drawn in *Lange* necessarily accommodates those features of the constitutional system, which combine to suggest that burdens on political communication by public servants may be more readily justified than similar burdens on other groups, because the imposition of such burdens on public servants promotes the functioning of the system of government for which the Constitution provides. An analogy may be drawn with the provisions in *McCloy*[20] that regulated representative government in order to protect it.

Effective burden

17. The first *Lange/McCloy* question is whether the relevant provisions, in their terms, operation or effect, effectively burden the implied freedom.[21] This question is directed towards the general burden 'upon the free flow of political communication within the federation',[22] rather than to the burden on political communication in a specific case.[23]

18. At the relevant time, s 13(11) provided that an 'APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS'. The 'APS Values' are set out in s 10 of the PS Act. While the Tribunal focused on s 10(1)(a), which provided that the 'APS is apolitical, performing its functions in an impartial and professional manner', s 13(11) refers to the APS Values as a whole, and no particular value is absolute or overriding.[24] These provisions are not targeted at political communication, and so do not require greater justification on that account.[25]

19. The Commonwealth accepts that s 13(11) of the PS Act, read with s 10(1)(a), effectively burdens political communication, as it restricts the capacity of public servants to engage in such communication. However, the first question does not simply conclude with a 'yes' or 'no' answer.[26] In cases where there is an effective burden on political communication, it is necessary to identify the nature and extent of that burden before it is possible to consider whether the burden is justified. That serves to 'focus

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[20] (2015) 257 CLR 178 at 208 [47], 221 [93] (French CJ, Kiefel, Bell and Keane JJ).
[21] *McCloy* (2015) 257 CLR 178 at 194 [2] (French CJ, Kiefel, Bell and Keane JJ).
[22] *Unions NSW v NSW* (2013) 252 CLR 530 at 574 [118]-[119] (Keane J) (***Unions NSW***).
[23] *Brown* (2017) 261 CLR 328 at 360 [90] (Kiefel CJ, Bell and Keane JJ).
[24] For example, the APS 'has the highest ethical standards', is 'openly accountable for its actions', and is required to be 'responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice' (ss 10(1)(d), (e) and (f)). All of these values must be upheld.
[25] *Brown* (2017) 261 CLR 328 at 390 [202] (Gageler J).
[26] Accepting that the question of whether there is a burden is qualitative rather than quantitative: *Unions NSW* (2013) 252 CLR 530 at 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92 at 212-213 [343] (Crennan, Kiefel and Bell JJ) (***Monis***).

and calibrate the inquiry mandated by the second step in the analysis'.[27]

20. It is the norms of conduct created by ss 13(11) and 10(a) that affect the political communication in which members of the APS can engage. While those norms are reinforced by the potential imposition of sanctions under s 15(1), variation in the severity of a sanction does not alter the burden on political communication, because the same communications are restricted by ss 13(11) and 10(1)(a) irrespective of the sanction that may be imposed if those provisions are breached. As Nettle J observed in *Brown*, 'what is relevant is the restriction of political communication by the prohibition ... and not the penalties imposed on persons contravening that prohibition'.[28]

21. In ascertaining the nature and extent of the burden imposed by ss 13(11) and 10(1)(a), several terms are of central importance. **First**, the term 'uphold' in s 13(11) means 'to support, sustain, or preserve unimpaired'.[29] In common with schemes that restrict freedom of expression to maintain the 'integrity' or 'reputation' of a profession, the rule limits the former in favour of the latter 'only for that purpose and to that extent'.[30] It thereby maintains a 'proportionate relationship between the two spheres of value and interest'.[31] **Secondly**, the word 'apolitical' in s 10(1)(a) is given content by the syntax of the provision. The state of being 'apolitical' is confined by what is necessary for the APS to perform its functions impartially and professionally. Section 10(1)(a) seeks to ensure that public servants carry out their functions in a detached manner, unaffected by their own political beliefs. It does not require public servants to be devoid of opinions. **Thirdly**, in addition to requiring APS employees to uphold the APS Values, s 13(11) also requires them to uphold the 'integrity' and 'good reputation' of the APS, and to do so 'at all times'. 'Integrity' is defined in the *Macquarie Dictionary* as the 'soundness of

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27 *Tajjour v NSW* (2014) 254 CLR 508 at 578-579 [146]-[147] (***Tajjour***). Such an approach appears to have been applied in *Brown* (2017) 261 CLR 328 at 353-362 [61]-[95] (Kiefel CJ, Bell and Keane JJ), 382-389 [180]-[199] (Gageler J), 407-413 [258]-[270] (Nettle J), 456-460 [397]-[411] (Gordon J).

28 *Brown* (2017) 261 CLR 328 at 408-9 [259] (Nettle J), see also at 382-383 [180]-[181], 385-386 [188] (Gageler J), 532 [567] (Edelman J); cf at 460 [411], 462-463 [422] (Gordon J). See also *Monis* (2013) 249 CLR 92 at 142 [108] (Hayne J); *Unions NSW* (2013) 252 CLR 530 at 574 [119] (Keane J).

29 *Macquarie Dictionary* (5th ed, 2009) at 1810.

30 See *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 at [60] (Bell J) (***McDonald***). His Honour construed former r 21 of the Victorian *Professional Conduct and Practice Rules 2005*, having regard to the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The principle of legality leads to a similar result in the current matter: see, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

31 *McDonald* [2017] VSC 89 at [60] (Bell J).

moral principle and character; uprightness; honesty'.[32] 'Reputation' is defined in the *Macquarie Dictionary* as 'the estimation in which a person or thing is held, especially by the community or the public generally'.[33]

22. Taken together, those terms produce a set of obligations the content of which is context dependent. What they require will vary with the characteristics of the person engaging in the conduct (eg, the seniority of the person within the APS[34]), the person to whom the communication is made (eg, a journalist, a colleague or a family member), when and where the communication is made (e.g. in public, at work, in private), whether the communication is verbal (eg, making a speech in a public place) or non-verbal (eg, attending a political rally), and the manner in which the communication is made (eg, whether it is combative or vitriolic as opposed to, for example, academic). For those reasons, in the subset of its operations that includes communicative conduct, the burden upon political communication arising from the Code is not correctly identified as a prohibition on APS members expressing political opinions. The Code is more nuanced.

23. Relevantly to the present matter, while many statements made anonymously will be incapable of affecting either the 'good reputation' of the APS, or its apolitical character, that is not universally true. For example, extreme racist or sexist remarks that are made anonymously may initially lack any link to the APS, but may cause grave damage to the good reputation of the APS if the speaker is subsequently revealed to be a member of the APS. Further, while a communication that is critical of the APS may have more weight if known to have been made by a member of the APS, such statements may damage the 'good reputation' of the APS even if it is not known who made the relevant communications. For those reasons, it is erroneous to attempt to draw a bright line that involves treating anonymous communications as if they require different treatment under the Code to communications that may be immediately attributed to a named public servant.[35] That is particularly true because, by definition, a communication cannot have remained anonymous if action is being taken under the Code in response to that communication. If an attempt at anonymity is relevant at all, that is most likely to

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32 *Macquarie Dictionary* (5th ed, 2009) at 867.

33 *Macquarie Dictionary* (5th ed, 2009) at 1405.

34 The relevance of seniority is confirmed by s 35(3)(c) of the PS Act, which obliges SES employees 'by personal example and other appropriate means' to promote 'the APS Values, the APS Employment Principles and compliance with the Code of Conduct'.

35 Cf Reasons at [91]-[119] (**CAB 53-61**).

be in the context of determining the appropriate sanction (where it may be either an aggravating or mitigating factor, depending on context). To the extent that the Tribunal's analysis hinged upon a bright line distinction between 'open' and 'anonymous' comment, the analysis was not sourced in the statute and was erroneous.

Compatible purpose –maintenance of a professional and politically neutral public service

24. The second question in the *Lange/McCloy* analysis is whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[36] The purpose of the law is derived from the text and statutory context, and if relevant, the history of the law.[37] It is similar to identifying the 'mischief' that the law is designed to address.[38]

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25. In the present case, the object of s 13(11) is evident from its text, for the subsection is expressed in the language of purpose: public servants are required to conduct themselves in a way that upholds the APS Values and the integrity and good reputation of the APS. That is consistent with the object in s 3(a) of the Act, being 'to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public'.

26. The pursuit of a politically neutral public service is plainly compatible with the constitutional system of government. Such neutrality has long been seen as an inherent requirement of a permanent professional public service, because it serves a number of different (but inter-related) systemic ends.[39] **First**, the Government of the day must be able to have confidence that APS employees will provide 'the same standard of high quality advice and implementation, irrespective of which political party is in power and irrespective of an employee's beliefs'.[40] **Secondly**, 'management and staffing decisions must be able to be made on a basis that is independent of the political party system, free

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36 *McCloy* (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

37 *Brown* (2017) 261 CLR 328 at 362-363 [96], [101] (Kiefel CJ, Bell and Keane JJ), 391-392 [208] (Gageler J), 432 [321] (Gordon J); *McCloy* (2015) 257 CLR 178 at 284 [320] (Gordon J), see also 212-213 [67] (French CJ, Kiefel, Bell and Keane JJ), 232 [132] (Gageler J); *Unions NSW* (2013) 252 CLR 230 at 557 [50].

38 *Brown* (2017) 261 CLR 328 at 432 [321] (Gordon J); *McCloy* (2015) 257 CLR 178 at 284 [320] (Gordon J).

39 In addition to the references below, see also *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 at [42] (Dickson CJ for the Court).

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40 Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (August 2017) at 8; Ontario Law Reform Commission, *Report on political activity, public comment and disclosure by Crown Employees* (1986) at 26 (**Ontario LRC Report**). See further, Management Advisory Board for the Australian Public Service and the Management Improvement Advisory Committee's, *Ethical Standards and Values in the Australian Public Service*, (Paper No 18, 1996).

from political bias and not influenced by the individual's political beliefs'.[41] **Thirdly**, expressions of political partisanship may in fact (or be seen to) affect promotional prospects within the public service, creating the potential for debilitating disharmony.[42]

Historical development of an apolitical public service

27. The purpose identified above is illuminated and confirmed by the history of the development of the public service. The concept of a permanent public service first emerged in the early to mid 19th century as part of 'efforts to reduce or eliminate the practice of political patronage'.[43] Although there had been incremental reforms in the early 19th century, it was the *Report on the Organisation of the Permanent Civil Service* in 1854[44] in the United Kingdom that called for a decisive break with a public service based on a patronage system and for the creation of a permanent professional public service based on competitive recruitment and promotion processes. The authors observed that it could 'safely be asserted' that 'the Government of the country could not be carried on' without a body of 'permanent officers' possessing 'sufficient independence, character, ability, and experience to be able to advise, assist, and to some extent, influence those who are from time to time set over them'.[45]

28. These developments were influential in the Australian colonies. In 1857, a Board appointed in the colony of Victoria to 'enquire into the arrangements for the better organisation of the civil service of the colony' condemned political influence in the appointment of civil servants and recommended the 'propriety of following the English precedent, and of appointing non-political and permanent officers to carry into execution the policy which the Ministry of the day may originate', emphasising that the 'presence of non-political chief officers, is a necessary condition to the satisfactory discharge of public business'.[46] In 1862, Victoria was the first English speaking jurisdiction to pass comprehensive legislation establishing and regulating a permanent

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41 *APS Values and Code of Conduct in Practice* at 24. See also Ontario LRC Report at 26-31.
42 Ontario LRC Report at 26-31.
43 Ontario LRC Report at 14.
44 Northcote and Trevelyan, *Report on the Organisation of the Permanent Civil Service* (1854) (***Northcote-Trevelyan Report***), cited in Ng, *Ministerial Advisers in a Framework of Australian Public Administration* (2016) at 40 (***Ministerial Advisers***). See also Fukuyama, *Political Order and Political Decay* (2015) at 129.
45 Northcote-Trevelyan Report (1854) at 3; Ng, *Ministerial Advisers* (2016) at 40-41.
46 Civil Service of the Colony of Victoria, *Report of the Board appointed to enquire into the arrangements for the better organisation of the civil service of the colony* (1857) at 4, 10, 13.

public service with the *Civil Service Act 1862* (Vic).[47] Section 28 of that Act empowered the Governor in Council to make regulations 'concerning the duties to be performed by officers of the Civil Service and the discipline to be observed in the performance of such duties'. Pursuant to that provision, cl 23 of the *Civil Service Regulations 1867* (Vic) prohibited public comment about any government matter by public servants '[i]n order that officers of all ranks may be enabled to render loyal and efficient service to Government'. Clause 32 provided for sanctions for breach of the regulations, including dismissal, reduction to a lower rank or lower salary, or a leave of absence. The antecedents of the relevant provisions can thus be traced to 1862.[48]

29. The framers of the Constitution were conscious of the potential for the intrusion of political partisanship into the soon to be established federal public service. In the Convention Debates on the clause that became s 67 (which is headed 'Appointment of civil servants'), Mr Wise moved an amendment to add words that would prevent the removal of a public servant 'except for cause assigned'. His object was to 'prevent civil servants from being removed from office for purely political reasons'.[49] While the amendment was not passed, there was no disagreement with the sentiment that Mr Wise expressed, and the concerns that he raised were addressed in the federal public service legislation that was enacted to 'otherwise provide' for the purposes of s 67.

Federal public service legislation in the 20th century

30. The Federal Parliament has passed three major Acts regulating the federal public service. Each of these Acts (or regulations made thereunder) has contained a prohibition on public comment by public servants.

31. The first Act was the *Commonwealth Public Service Act 1902* (Cth). Under the authority of that Act, reg 41 of the *Public Service Regulations* provided that '[o]fficers are expressly forbidden to publicly discuss or in any way promote political movements.

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47 Fukuyama, *Political Order and Political Decay* (2015) at 132; *Bennett v HREOC* (2003) 134 FCR 334 at 349 [54] (Finn J).

48 Similarly, in 1874, the colony of South Australia passed the *Civil Service Act 1874* (SA) and cll 17 and 18 of the *Civil Service Regulations 1874* (SA). The reform of the public service was also a topic of prominent concern in the colonies of NSW and Queensland, where royal commissions inquired into the topic: see Caiden, *Career Service: An Introduction to the History of Personnel Administration in the Commonwealth Public Service of Australia 1901-1961* (1964) at 41-44.

49 The amendment was objected to on a number of bases, including that the Executive would be responsible to Parliament in respect of any such action, and that the Constitution should not descend to that level of detail: *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897 at 916-917, 916-920.

They are further forbidden to use for political purposes information gained by them in the course of duty'. Regulation 41 was repealed and replaced in 1909. Regulation 41 of the new regulations included a provision that '[a]n officer shall not ... [p]ublicly comment upon the administration of any Department of the Commonwealth'.[50]

32. The second Act was the *Public Service Act 1922* (Cth). Under the authority of that Act, reg 34 of the *Commonwealth Public Service Regulations* included a provision that '[a]n officer shall not (a) publicly comment upon any administrative action or upon the administration of any Department'.[51]

33. The third Act is the PS Act. The main object of that Act is expressed in s 3 to be 'to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public'. The report that preceded and informed the enactment of the PS Act[52] said that the PS Act would 'remedy a number of serious deficiencies and omissions in the current legislative framework', including that there was 'no acknowledgment of the need for a non-partisan and apolitical public service'.[53] It stated that '[t]he public interest in maintaining public service integrity and professionalism will be met by the obligations relating to: a core of statutory Values, encompassing qualities such as political impartiality, high ethical standards, workplace equity and employment decisions based on merit; a code of conduct; directions set by the Public Service Commissioner; and the internal and external review of grievances'.[54]

34. This history illustrates that the relevant provisions of the PS Act serve a compelling purpose that is not only consistent with the constitutionally prescribed system of representative and responsible government, but that protects and enhances it.[55]

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50 *Provisional Regulation under the Commonwealth Public Service Act 1902* (Cth) (1909, SR No.6); *Regulations under the Commonwealth Public Service Act 1902* (Cth) (1909, SR No 50).

51 Regulation 34 was repealed by the *Public Service Regulations (Amendment) 1987* (Cth). Its replacement (reg 8A(h)) did not contain an equivalent provision, reflecting a change in emphasis 'from restriction on public comment to the imposition of a duty on officers not to misuse official information gained in the course of employment': see Explanatory Statement, *Public Service Regulations (Amendment),* SR 1987 No 137.

52 Public Service Bill, Explanatory Memorandum at [11]-[12].

53 Public Service and Merit Protection Commission and Department of Industrial Relations, *Accountability in a devolved management framework* (May 1997) at 6.

54 *Accountability in a devolved management framework* (May 1997) at 4.

55 See *ACTV v Commonwealth* (1992) 177 CLR 106 at 234-235 (McHugh J). See also *Commissioner of Taxation v Futuris* (2008) 237 CLR 146 at 164 [55] (Gummow, Hayne, Heydon and Crennan JJ), stating that throughout 'the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest'.

Reasonably appropriate and adapted to the legitimate purpose?

35. The final question in the *Lange/McCloy* analysis is whether the law is reasonably appropriate and adapted to advance its legitimate object.[56] One means by which that question may be answered is three-stage proportionality testing: whether the law is suitable, necessary, and adequate in its balance.[57] The application of that framework is sufficient to demonstrate that the relevant provisions are consistent with the implied freedom.

36. Whether a law is 'suitable' will depend upon whether there is a rational connection between the legitimate purpose and the means chosen to achieve it.[58] The requirement that public servants uphold the good reputation of the APS, and the value that the APS is apolitical, is plainly rationally capable of achieving the objects identified above.

37. Whether the law is 'necessary' turns upon whether there is an obvious and compelling alternative, reasonably practicable means of achieving the same purpose that has a 'significantly' less restrictive effect upon the freedom.[59] One possible alternative that might be presented by the Respondent is the potential for the exclusion of anonymous comment. However, such a law would differ radically from the relevant provisions.[60] Far from achieving the same purpose, it would create an area of immunity for conduct even if it undermined the APS Values and the integrity and good reputation of the APS.

38. Whether a law is 'adequate in its balance' is a 'criterion requiring a value judgment, consistently within the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'.[61] In this case, a number of factors suggest that the relevant provisions are adequate in their balance.

39. **First**, the history of the relevant provisions demonstrates that they have long been regarded as performing a central role in preserving the apolitical nature of the APS,

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[56] *McCloy* (2015) 257 CLR 178 at 194 [2] (French CJ, Kiefel, Bell and Keane JJ).
[57] *McCloy* (2015) 257 CLR 178 at 195 [4], 215 [74] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at 359 [88], 364 [104] (Kiefel CJ, Bell and Keane JJ), 416 [278] (Nettle J).
[58] *McCloy* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW* (2013) 252 CLR 530 at 560 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 254 CLR 508 at 562 [78] (Hayne J).
[59] *McCloy* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at 418 [282], 422 [289] (Nettle J).
[60] For a similar analysis, see *Tajjour* (2014) 254 CLR 508 at 563-566 [80]-[90] (Hayne J).
[61] *McCloy* (2015) 257 CLR 178 at 195 [2], 218 [84], [86] (French CJ, Kiefel, Bell and Keane JJ).

which is in turn essential to its capacity to perform its role exercising executive power within the framework of representative and responsible government (including, in particular, upon a change of government). Except for a period between 1987 and 1999, provisions of a similar kind have been a permanent feature in federal public service legislation since federation. The importance of that purpose strongly justifies the imposition of the burden on political communication by public servants. An important purpose may justify sizeable burdens on political communication.[62]

40. **Second**, the relevant provisions of the PS Act are addressed to a range of circumstances and operate by reference to the character or effect of an APS employee's conduct. They are directed to conduct that undermines the integrity or effectiveness of the APS. By reason of the construction to be given to the term 'uphold' (see [21] above), they limit political communication in favour of those (important) objects only for that purpose and to that extent. By adopting that approach the scheme provides for individualised administrative decision-making tailored to the achievement of its statutory objects.

41. **Third**, a determination that the Code has been breached can only be made pursuant to a generally applicable procedure that is transparent, known in advance, which affords procedural fairness, and for which reasons are available.[63] Determinations are (with prescribed exceptions) subject to both merits[64] and judicial review.[65] Public servants also have the benefit of the general protections provided by the *Fair Work Act 2009* (Cth). Such mechanisms provide 'ample machinery'[66] to ensure that the flexibility inherent in the scheme does not result in decisions that arbitrarily, capriciously or excessively burden political communication.[67] The scheme is – as a matter of deliberate design – apt to produce outcomes that appropriately balance competing interests.

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62 *McCloy* (2015) 257 CLR 178 at 218 [84], [86] (French CJ, Kiefel, Bell and Keane JJ).

63 Under ss 15(1) and (3)-(8) of the PS Act, a determination that an APS employee has breached the Code can only be made following the written and publicly available procedures established by the Agency Head. Those procedures must comply with the 'basic procedural requirements' set out in the Commissioner's directions made under s 15(4)(a) and must have 'due regard' to procedural fairness. As to reasons, see ss 5 and 13 of the *Administrative Law (Judicial Review) Act 1977* (Cth) and note that decisions under s 15(1) of the PS Act are not amongst the classes of decisions to which that does Act not apply (see s 3 and Sch 1).

64 *Public Service Act 1999* (Cth), s 33; *Public Service Regulations 1999* (Cth), regs 5.22, 7.2A, 7.3. See also *Fair Work Act 2009* (Cth), ss 365, 372, 394.

65 See, apparently accepting the relevance of those matters to the issue of whether a law imposes a burden on the freedom which is 'undue', *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 87 [213] (Crennan and Kiefel JJ, Bell J agreeing at 90 [224]). See also *Wotton* (2012) 246 CLR 1 at 16 [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 33 [88] (Kiefel J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 303 (Mason CJ), 331-332 (Brennan J), 342 (Deane J), 381 (Toohey J) (***Cunliffe***).

66 *Cunliffe* (1994) 182 CLR 272 at 331-332 (Brennan J).

67 See, eg, *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 670 (the Court).

42. **Fourth**, the burden is part of the statutory framework governing the employment relationship of the Respondent and the Commonwealth.[68] As the Supreme Court of Canada has observed, a person entering or employed by the public service 'must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government'.[69] That consideration was given weight by the delegate of the Department in this case.[70]

Alternative submission on Question 1

43. The Commonwealth's alternative submission on Question 1 starts from the premise that (contrary to the Commonwealth's primary submission) ss 13 and 15(1) together impose the relevant burden on political communication, or that the sanction imposed under s 15(1) is at least relevant to determining the nature and extent of that burden.

44. The alternative position does not alter the outcome of the analysis. The provision made in s 15(1) for the imposition of sanctions serves the purpose of enforcing (thereby maintaining) the standards of conduct set by s 13,[71] and has a rational connection to the same (compelling) objects to which those standards are directed.

45. Further, the imposition of a particular sanction under s 15(1) is subject to the same review mechanisms identified at [41] above. In addition, quite independently of the implied freedom, s 15(1) requires any sanction that is imposed to be proportionate to the breach of the Code that attracts the sanction. That follows by analogy with ordinary principles of proportionality in sentencing that are routinely applied by courts and administrators.[72] In this context, those ordinary principles are 'akin' to the proportionality assessment that has to be made for *Lange* purposes.[73] That limit on s 15(1) draws further support from the general presumption that, in the absence of any

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68 *Commonwealth Bank v Barker* (2014) 253 CLR 169 at 183 [16] (French CJ, Bell and Keane JJ); *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 670 (the Court).

69 *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 at [43] (Dickson CJ for the Court). See also, in a somewhat analogous context, *Chief of Defence Force v Gaynor* (2017) 246 FCR 298 at 323 [106] (the Court).

70 Reasons at [13] (**CAB 15**). The *Public Service Regulations 1999* (Cth), reg 3.16 require that each APS employee must inform himself or herself about the PS Act, the Regulations and the Commissioner's Directions.

71 See, in the context of the *Public Service Act 1922* (Cth), *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 181-182 [35], [36] (Gummow, Kirby, Hayne and Kiefel JJ).

72 See Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85 at 85.

73 See, eg, *Wotton* (2012) 246 CLR 1 at 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

contrary statutory indication,[74] statutory powers are construed as not empowering a decision maker to '[exceed] what, on any view is necessary for the purpose [the discretion] serves'.[75] Such a presumption is readily applied to s 15(1), having regard to the carefully graduated sanctions for which Parliament has provided (including no sanction at all). These limits are sufficient to conclude that any additional burden on political communication arising from s 15(1) is justified.[76]

Answer to Question 1

46. If the Court accepts either of the above arguments, Questions 1 and 3 should be answered 'yes' and Question 2 should be answered 'unnecessary to answer'.

Question 2: The implied freedom and statutory discretions

47. This question arises only if the Court rejects the Commonwealth's primary submission that, on a conventional application of the *Lange/McCloy* test, the impugned provisions are valid in all of their potential operations. Against that possibility, the following argument proceeds on the assumption that ss 13 and 15(1) together confer a power the exercise of which may, but for the principle of construction discussed below, result in a burden upon political communication that would exceed constitutional limits.

48. The principles to be applied in such a case were identified by Brennan J in *Miller v TCN Channel Nine Pty Ltd*, which concerned the interaction of s 92 of the Constitution with the discretionary power to grant a licence conferred by s 5 of the *Wireless Telegraphy Act 1905* (Cth). Brennan J reasoned that:[77] **first**, the Constitution cannot support a discretion that can be exercised in a manner obnoxious to the freedom guaranteed by s 92 (or, by parity of reasoning, contrary to any other constitutional limit); **second**, a statutory discretion expressed in general terms that appears capable of being exercised in such a manner should not be held invalid; instead such a discretion is construed as being required to be exercised by the repository of a power in accordance with any applicable law, including a constitutional limit such as s 92; **third**, the means by which any resulting excess of power is restrained is judicial review of administrative action, for an attempt to exercise the discretion inconsistently with a constitutional limit will be

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74 *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at 728 [53] (Gageler J).
75 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 352 [30] (French CJ), 366 [73]-[74] (Hayne, Kiefel and Bell JJ) (***Li***).
76 *Wotton* (2012) 246 CLR 1 at 34 [91] (Kiefel J).
77 *Miller* (1986) 161 CLR 556 at 612-614.

outside the statutory power; **fourth**, the principles that are to be applied to determine whether a particular exercise of a discretion would be obnoxious to s 92 conform to the principles applied to determine whether a statute is inconsistent with s 92.

49. Although Brennan J was in dissent in *Miller*, his reasoning was applied to limitations arising from the implied freedom of political communication in *Wotton*.[78] After referring to the rule of construction referred to in [48] above (the second point),[79] French CJ, Gummow, Hayne, Crennan and Bell JJ (with whom Kiefel J agreed) said that if a discretion be 'susceptible of exercise' in accordance with a constitutional restriction upon legislative power then the legislation conferring that discretion is effective in those terms, without any question of severance or reading down arising.[80]

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50. The relevant passages in *Wotton* were directed to statutory powers that could not be assessed on their face as necessarily consistent or inconsistent with the Constitution. It is that circumstance that attracts the rule of construction identified in *Miller*, with the result that the boundaries of the executive power conferred by the statute align with the limits on legislative power arising from the Constitution. That result is arrived at by a process of construction, rather than reading down, although the result is in substance the same.[81] The discretionary power is construed as extending right up to, but not beyond, the limit of constitutional power, notwithstanding that the statutory text may appear to go further. On that approach, while the limits of the statutory power do not directly raise any question of constitutional law, in order to determine whether a statute authorises a

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particular decision it may be necessary to ask questions of constitutional law, because the answer to those questions will determine the boundary of the statutory power.[82]

51. Where the relevant constitutional limitation is the implied freedom, the above approach does not require the application of all of the steps in the *Lange/McCloy* analysis to each exercise of power under a statute. It may, however, require that analysis to be completed by reference to the particular administrative decision that is impugned, so as to test

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78 See also the reference to Brennan J's reasons in *Miller* in *Sportsbet v NSW* (2012) 249 CLR 298 at 316 [12] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

79 (2012) 246 CLR 1 at 9-10 [10], 13-14 [21].

80 *Wotton* (2012) 246 CLR 1 at 14 [23].

81 *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Coleman v Power* (2004) 220 CLR 1 at 55-56 [108]-[110] (McHugh J); *Monis* (2013) 249 CLR 92, 210 [334]-[335] (Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 254 CLR 508 at 585-589 [168]-[176] (Gageler J).

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82 See *Wainohu* (2011) 243 CLR 181 at 231 [113] (Gummow, Hayne, Crennan and Bell JJ), 220 [72] (French CJ and Kiefel J relevantly agreeing); *Brown* (2017) 261 CLR 328 at 387 [190] (Gageler J).

whether the statute authorises that particular decision.

52. It will generally be unnecessary to consider the questions of compatibility and suitability when determining whether any particular decision has transgressed the constitutional limit, because the compatibility of a statute with those requirements cannot vary from decision to decision. For example, if the purpose of a particular statute survives compatibility testing when assessed in the normal way, it will follow that all decisions that are authorised by that statute will be made for a compatible purpose.[83]

53. At least in the current statutory context, the same is true of necessity testing. That is because (for the reasons given at [45]) the relevant provisions themselves ensure that a decision maker considering an exercise of the power conferred by s 15(1) cannot exceed what is necessary for the statutory purpose. A failure to select a sanction that is an obvious and compelling reasonably practicable means of achieving the statutory purpose (where that sanction would have a significantly less restrictive effect upon political communication) will self-evidently exceed that generally applicable statutory constraint. The same will be true for many other statutory powers, although not those where, for example, the statute requires only that the repository of power exercise the power in good faith and for the statutory purposes.[84]

54. By contrast, when assessing adequacy of balance in the context of broadly framed statutory powers that appear on their face capable of exceeding constitutional limits, it may be necessary to complete the constitutional analysis by reference to the impugned administrative decision. The rule of construction identified in *Miller* means that such a power is valid because it is construed as operating subject to the constitutional limit, meaning that the question shifts to whether particular decisions fall within that limit.

55. How, then, does one apply that aspect of the test at the level of a particular administrative decision? Some assistance may be drawn from decisions in the context of the Canadian Charter, where the question on judicial review is whether the balance drawn by the decision maker falls within a range of reasonable alternatives.[85] An

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[83] *Li* (2013) 249 CLR 332 at 348-349 [23] (French CJ); *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758 (Dixon J); *Water Conservation Commission v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

[84] *SZVFW* (2018) 92 ALJR 713 at 728 [53] (Gageler J).

[85] *Doré v Barreau du Québec* [2012] SCC 12 at 426 [56] (Abella J). See also *Law Society of British Columbia v Trinity Western University* [2018] SCC 32 at [82] (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ); Boughey *Human Rights and Judicial Review in Australia and Canada* (2017) at 95-101.

inquiry that bears some resemblance to the last step of *McCloy* is also undertaken in testing the validity of the exercise of statutory powers in the United Kingdom.[86] However, considerable caution is required in applying these overseas authorities in an Australian context, given that they involve asking whether a balance has been struck between the 'rights of the individual' on the one hand, and the 'interests of the community' or importance of the objective on the other. That plainly is not the correct question in Australia, having regard to the systemic nature of the implied freedom and the established proposition that it does not protect individual rights.

56. In light of those differences, the relevant inquiry is this: if the statute were to authorise burdens on political communication of the nature and extent that arise from a particular administrative decision purportedly made under the statute, would that present as grossly disproportionate to or as otherwise going far beyond what can reasonably be justified in pursuit of the statutory purpose?[87] If the answer is 'yes', the particular exercise of power is *ultra vires*. That formulation avoids any conceptual difficulty that might be thought to arise from the fact that any single exercise of discretion will only marginally burden the freedom,[88] and it maintains the required systemic focus. It also conforms with the analysis said by Brennan J in *Miller* to be required in such a case – ascertaining the limits which are to confine and qualify the grant of discretionary power,[89] which is to be construed so as not to 'unreasonably burden political communication'.[90]

57. It is important to emphasise that the analytical framework just described does not require an administrative decision-maker to consider the relationship between the decision and the implied freedom. The *Lange/McCloy* steps are not mandatory relevant considerations. Indeed, to suggest that 'the constitutional limit on the scope of a power is a factor which must be taken into account by the authority in the course of exercising

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86 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 770-771 [20] (Lord Sumption) 790-791 [74] (Lord Reed, in dissent in the result). See also *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 [113], [118]-[119] (Lady Hale), [60] (Lord Carnwath), [105]-[109] (Lord Mance); *Youseff v Secretary of State for Foreign and Commonwealth Affairs* [2016] 2 WLR 509 [56] (Lord Carnwath).

87 Adapting Nettle J's forumulation of the test in *Brown* (2017) 261 CLR 328 at 418 [282].

88 Walker and Hume, 'Broadly Framed Powers and the Constitution' in Williams (ed), *Key Issues in Public Law* (2017) 144 at 161.

89 *Miller* (1986) 161 CLR 556 at 614.

90 *Wainohu* (2011) 243 CLR 181 at 231 [113] (Gummow, Hayne, Crennan and Bell JJ).

the power' is to introduce an 'element of conceptual confusion'.[91] That is because the implied freedom 'operates as an ultimate limit on power, and an ultimate limit on power cannot sensibly be described as a mandatory consideration'.[92] Whether a particular decision complies with that limit will ultimately be a question for a court in a judicial review proceeding. So long as the court concludes that the decision is within constitutional limits, the court should not hold a decision to be invalid simply because the decision-maker did not consider the implied freedom in making that decision. Of course, a prudent decision-maker may consider the implied freedom in the exercise of a discretionary power, so as to reduce the likelihood that the decision will fall foul of constitutional limitations. But that is not required as a condition of validity.

10 58. Applying the above approach, the decision of the primary decision-maker to terminate the Respondent's employment fell comfortably within the range of permissible decisions, having regard to the matters referred to by the primary decision maker in support of the determination that termination was the appropriate sanction.[93] Accordingly, the exercise of the discretion to terminate the Respondent's employment was within the scope of the power conferred by s 15(1). The Tribunal was wrong to hold otherwise. On that basis, Questions 2 and 3 should be answered 'yes'.

PART V ESTIMATED TIME FOR ORAL ARGUMENT

59. The Commonwealth estimates that it will require 2.5 hours for the presentation of oral
20 argument.

Dated: 7 November 2018

.....	.....	.....
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[91] *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 at 257 [56] (Basten JA, Bathurst CJ and Ward JA agreeing at 245 [7] and 273 [149] respectively).

[92] Walker and Hume, 'Broadly Framed Powers and the Constitution' at 157.

[93] These are set out at Reasons [13]-[14] (**CAB 15-16**).