IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY **NO C 12 OF 2018**

BETWEEN: **COMCARE**

Appellant

AND: **MS MICHAELA BANERJI**

Respondent

REPLY SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Attorney-General of the Commonwealth by:

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PART I FORM OF SUBMISSIONS

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

PART II REPLY

2. ***Notice of contention***: The only issue joined before the Tribunal was whether the termination of the Respondent's employment was not "reasonable administrative action carried out in a reasonable manner" because it was contrary to the implied freedom of political communication (**T [6]; CAB 12**). The Respondent's argument in this appeal that her termination was invalid because communications that are anonymous at the time they occur are "incapable" of breaching the Code is an attempt to advance an entirely new case. That case is not properly characterised as a construction argument, for the parties substantially agree on the proper construction of the Code, including that there must be a nexus between the conduct alleged to breach the Code and the APS as an institution (**CS [21]-[22]; RS [17]**). Rather, her new argument turns on the factual claim that no such nexus exists because communications that are anonymous at the time they occur are "incapable" of "altering the appearance or reality that the APS is institutionally apolitical and performs its functions impartially and professionally" (**RS [18]**, see also **[26], [46]-[47], [56], [59]**). The Respondent should be bound by the conduct of her case.[1] No reason is given as to why this is an exceptional case such that she should be permitted to advance a new argument on appeal, particularly as the argument in issue is a factual argument and this is an appeal on a question of law.[2]

3. ***Construction of PS Act***: The Commonwealth's construction of ss 10(1)(a) and 13(11) involves two essential propositions: ***first***, those provisions are directed to conduct that undermines the integrity or effectiveness of the APS; ***secondly***, those provisions limit political communication only for that purpose and to that extent (**CS [21]-[22], [40]**).[3] Those points are common ground (**RS [18], [25]**). The Commonwealth plainly does not suggest that the Code regulates conduct that is "devoid of any connection whatsoever to employment" (**RS [24]-[25]**, also **[41], [52]**), or that the Commonwealth has an interest in "cleansing APS employees of political opinions" (**RS [55]**). The Respondent erects and demolishes arguments of straw.

4. The Respondent contends that there is a bright line distinction between conduct that is in

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1 *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51] (Gleeson CJ, McHugh and Gummow JJ).

2 Cf *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 256-257 [41], 258 [50] (the Court).

3 "[A]t all times" in s 13(11) does not mean "always and under any circumstances" (cf **WA [11]-[13]**).

some sense "anonymous" and conduct that is not. In advancing that submission, she uses the phrase "anonymous communication" to mean "communications whose immediate context evinces no connection to the speaker's status as an APS employee (eg by giving his or her name, or position as a public servant)" (**RS [17]** (emphasis added), and see also **RS [26], [29]** and **[47]**). There are three major difficulties with that submission.

5. ***First***, it is ambiguous. What, for example, is meant by "position as a public servant"? Does a communication cease to be anonymous if the context reveals the fact that the source of the communication is a public servant? Or must it also reveal the person's level within the APS, or the Department for which they work? The PS Act provides no answer to these questions.

6. ***Second***, the uncertainty is exacerbated by the Respondent's allowance that a person's employment status may be "identified in or identifiable from" the immediate context of the conduct (eg **RS [25], [29]**). Whether a person's "status" is "identifiable" will often depend on numerous matters, including the skill and knowledge of the audience. Here, the Respondent contends that her status was not "identifiable" because investigatory steps were required to establish the identity of LaLegale (**RS [47]**). In fact, those steps were taken only because Mr Logan's complaint alleged that he "strongly suspected" the Respondent of using the La Legale Twitter handle (**FM 15-18**). On her own approach, the Respondent was "identifiable" and her communications were not "anonymous".[4]

7. ***Third***, the Respondent's creation of a temporal requirement, being her assertion that the nexus between a communication and the APS must appear from the "immediate context", is uncertain in its content, has no textual foundation, and is inconsistent with the purpose of the PS Act. Yet that asserted requirement is the only foundation for the critical plank of her argument that it is "irrelevant" that a communication that is "anonymous" at the time it occurs may subsequently cease to be so, with the result that damage is caused to the apolitical status of the APS or to its good reputation (**RS [27]**).

8. The difficulties with the Respondent's "immediate context" argument can be illustrated by a variation of the Respondent's own example (**RS [25]**). If an APS employee engages in a racist tirade on public transport, why should it matter whether that employee is immediately identified (e.g. by a colleague on the bus) or more remotely identified (such

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4 While the Respondent asserts (**RS [47]**) that "it was not possible from … the making of the tweets … to ascertain her identity or her status as an APS employee", the Tribunal found only that she "*intended* that her tweets could not be attributable to her" (**T [93]; CAB 54** (emphasis added)). Further, she used Twitter, after she was notified of the disciplinary investigation, in a way that strongly suggested that she was a public servant (**FM 129**).

as in the media the next day)? The "damaging" effect on the APS that would be caused by such a tirade is identical in each case (cf **RS [25]**). The position is no different if the tirade originally occurred in an "anonymous" post online, but the person who made that post is later identified as an APS employee. There is no textual reason — or defensible policy reason — why the APS must close its eyes to the damage that the continued employment of a person may cause to the APS, simply because the relevant nexus was not immediately apparent at the time when the relevant conduct occurred. What matters is the prospect of damage to the APS, not the temporal proximity between the conduct and the damage.

9. To take a different example, if the Respondent's argument is correct then the Secretary of a Department could "live-tweet" a partisan political commentary, providing a real-time critique of the policy portfolio of her own Minister, without any breach of the Code, provided only that the Secretary could not be identified (to whatever degree is necessary to cease to be "anonymous") from the "immediate context". On the Respondent's approach, no action could be taken against the Secretary, even if the Secretary's identity was later publicly exposed through, for example, questioning at a Parliamentary Committee or the actions of a journalist or computer hacker. Despite the egregious damage such conduct would do to the apolitical character of the APS, the Respondent is wedded to the absolute proposition that the Secretary's conduct is "incapable" of damaging the apolitical reputation of the APS simply because she was anonymous at the time the tweets occurred. That is absurd.

10. The Respondent contends that in such cases the damage to the APS is done, not by the conduct of the APS employee, but by the person who links that conduct to the APS (**RS [27]**). That reasoning attributes to the messenger responsibility for damage caused by the content of the message. It is without textual or other justification (cf **RS [18]**, **[59]**).

11. ***Interpretive presumptions***: No occasion arises to apply the principle of legality in this case for two reasons (cf **RS [39]**, **[41]**). ***First***, there is no constructional choice to be resolved, as there is no basis in the text of ss 13 or 15 to carve out a zone of immunity for "anonymous" conduct. ***Secondly***, as Parliament plainly intended the Code to burden free speech, the principle of legality does not assist in ascertaining the intended extent of that

burden.[5] The principle that legislation should if possible be construed as being consistent with the Constitution is likewise of no present relevance because, to the limited extent that there is any dispute as to the construction of the relevant provisions of the PS Act, both constructions are compatible with the implied freedom (cf **RS [40]-[41]**).[6]

12. ***Outward and inward facing values:*** The descriptions of APS Values as "inward facing" and "outward facing" presents a false dichotomy (**RS [19]-[22]**). Section 10(1)(a) is not concerned only with an "outward facing" "apolitical image" (**RS [21], [27]** (emphasis added)). It is equally directed to matters of substance concerning the "internal processes" of government, such as ensuring that the APS has the confidence of the Government of the day, and is not mired in debilitating internal conflict (see **CS [26]**). The importance of those matters is illustrated by the facts of this case, the Respondent having engaged in public criticism of her immediate supervisor that caused disharmony in the workplace (**FM 18.5**).

13. ***Legislative history***: The legislative history upon which the Respondent relies does not require a narrow reading of ss 13(11) and 10(1)(a) (cf **RS [34]-[38]**). The minutiae of reforms in 1974 and 1987 has little, if any, relevance to the interpretation of provisions enacted in different terms 12 years later, particularly as those provisions formed part of a complete revision of public service legislation that was enacted to introduce a "less prescriptive" and "wholly new conceptual framework".[7] The flexibility that the Respondent deprecates as "uncertainty" (**RS [41]**) was the point of that new approach.

14. **McCloy *and administrative decisions***: The Respondent seeks to extend the *McCloy* structured proportionality test to judicial review of all exercises of discretionary power that restrict political communication (**RS [43]**). Her submissions in that regard ignore this Court's ruling in *Wotton v Queensland*[8] that, if legislation conferring such a power is valid when assessed against constitutional limits, the constitutional inquiry ends (see **CS [4]**). The Respondent does not address the Commonwealth's alternative submission (**CS [43]-[45]**) that, even if s 15(1) of the PS Act *is* relevant to the burden on political

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5 See *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 310-311 [314] (Gageler and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 605-606 [81] (Gageler J).

6 For similar reasons, there is no occasion to consider the Australian Human Rights Commission's (**AHRC**) submissions about when, and how, a law is to be read down to avoid invalidity (see **AHRC [42]-[52]**), as no party contends for a construction that would exceed Commonwealth legislative power.

7 Public Service and Merit Protection Commission and Department of Industrial Relations, *Accountability in a devolved management framework* (May 1997) at 1, 4, 7.

8 (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (***Wotton***).

communication, ss 13(11) and 15(1) are together constitutionally valid, meaning that any decision made under those provisions is assessed only against statutory limits. Likewise, *Minister for Immigration v Li*[9] does not provide a basis for the direct application of the *McCloy* framework to administrative decisions (cf **RS [43]-[44]**).[10]

15. ***Relevant considerations:*** The Respondent's "relevant considerations" argument is conceptually confused, for it treats an ultimate limit on power merely as a matter to be considered in exercising the power (**RS [45]**). Further, it would require ordinary administrative decision makers to conduct a constitutional analysis (and to do so without error) in order to make a valid decision. Such an approach is impractical, not least because it may invalidate administrative decisions even when any burden they impose on political communications is obviously justifiable.

16. ***Validity:*** The parties are in agreement with respect to burden and legitimate purpose (**RS [55]**). The Respondent nevertheless submits that the regulation of "anonymous conduct" has no rational connection to the relevant legitimate purpose (**RS [58]**) or that a scheme that did not regulate such conduct would constitute an obvious or compelling alternative, reasonable, practicable means of achieving the same purpose that has a less restrictive effect upon the freedom (**RS [59]**). Both submissions rest upon the proposition that anonymous conduct can have no bearing upon the APS as an institution. For the reasons given above, that proposition is not right. A similar and equally erroneous argument lies at the heart of the Respondent's submissions regarding adequacy of balance (the first and third points in **RS [60]**). The impugned provisions are valid.

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9 (2013) 249 CLR 332.

10 The submissions of the AHRC regarding that issue (**AHRC [9]-[20]**) should also be rejected. *Wotton*, which the AHRC seeks radically to limit, explained how the implied freedom constrains statutory executive power — that is, it will generally do so at the level of the (statutory) conferral of power (see **CS [47]-[56]**). No party or intervener seeks to re-open *Wotton*. The AHRC's attempt to limit that authority to exercises of State public power (**AHRC [20]**) is unconvincing. Executive power is conferred on the executive organs of the States by exercises of State legislative power and/or by the relevant State constitution, both of which are subject to the Constitution (ss 106, 107) and thus subject to the implied freedom. Nor are the AHRC's submissions aided by an appeal to *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, which concerned a delegated legislative power.