IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C12 of 2018

BETWEEN

COMCARE
Appellant

AND

MICHAELA BANERJI
Respondent

10

RESPONDENT'S SUBMISSIONS

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I INTERNET PUBLICATION

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

II ISSUES

2. Two main issues arise in this appeal. ***First***, did the *Public Service Act 1999* (Cth) (**PSA**),[1] on its proper construction, authorise termination of the employment of the respondent (**Ms Banerji**) in the Australian Public Service? ***Second***, if the answer to the first question is "yes", then are the relevant provisions of the PSA invalid because they impermissibly burden the implied freedom of political communication?

3. Ms Banerji submits that ss 10(1)(a), 13(11) and 15(1) of the PSA, properly construed, did not authorise the termination of her employment. This corresponds with Ms Banerji's notice of contention and, in substance, question two in the notice of appeal. Alternatively, if these provisions are so intractably broad in scope that they authorised the termination of her employment for her conduct, Ms Banerji submits that they impose a burden on political communication that cannot be justified under the second limb of the *Lange* test, as explained in *McCloy* and *Brown*, and are invalid. This submission corresponds with question one in the notice of appeal. On either basis, the termination was not "reasonable administrative action taken in a reasonable manner" within s 5A of the *Safety, Rehabilitation and Compensation Act 1998* (Cth) (**SRC Act**).

III SECTION 78B NOTICES

4. The Attorney-General of the Commonwealth (**Commonwealth**) has served notices under s 78B of the *Judiciary Act 1903* (Cth).

IV FACTS

5. The following background matters, which do not emerge sufficiently from other submissions (**CS [12]-[14]; NSW [7]-[14]**), require emphasis.

6. ***The tweets and the investigation:*** Ms Banerji was a non-executive level employee with the Department of Immigration (**DIAC**) (**AF [3]**). Prior to 7 March 2012, she tweeted using the Twitter handle "LaLegale" (**AF [13]**). At that time, the identity of LaLegale was not publicly known (**AF [13]**). LaLegale's Twitter profile contained no information

[1] In these submissions, references to the PSA are references to that statute as at 15 October 2012. The references below are to: the Statement of Agreed Facts and Issues (**AF**) before the Tribunal (reproduced without supporting references in the Tribunal decision at [3]), located in Comcare's Book of Further Materials (**FM**) at p1, and its attached documents (**FM 9-276**); and the Tribunal decision (**T**).

about the accountholder, apart from the following: "Lawyer. Family Dispute Resolution Practitioner. Teacher. Journalist. Canberra, Australia" (**FM 57**). Examples of Ms Banerji's tweets are at **T [9]** and **FM 57-56**. They concerned topics including "our invasion of Iraq", the problems associated with offshore processing of asylum seekers and Australia's obligations under the Refugee Convention and Protocol.

7. Ms Banerji's tweets were all "anonymous", in the sense that she took care that they could not be attributed to her (**T [92]-[94]**). None of them disclosed confidential information obtained through her role at DIAC (**AF [13]**). Only once did she tweet while at work (**T [30]**). In response to LaLegale's criticism of "IDCs" (immigration detention centres) (**FM 64**), her superior within DIAC (Mr Sandi Logan) tweeted: "Give it a rest @LaLegale. #DIAC celebrates success, not mired in harping. If you have policy frustration, take it where it will make a diff" (**FM 63**). During work hours, Ms Banerji then "retweeted" the following response by another Twitter user: "@SandiHLogan What a rude response! And where would you suggest @LaLegale take her 'policy frustration'?" (**FM 63-64**; **T [27], [30]**). This single instance aside, Ms Banerji was "careful, even assiduous, in avoiding posting tweets during working hours" (**T [26]**).

8. On 9 May 2012, Mr Logan lodged a complaint with DIAC's Workplace Relations and Conduct team (**WRC**), advising of his concerns that Ms Banerji was using the LaLegale Twitter handle and placing "the department at considerable reputational risk" by posting "often highly critical posts about the government, the minister, immigration portfolio policy, and on one occasion, about some departmental staff (including me)" – the latter causing Mr Logan "offen[ce]" (**FM 17-18**). He requested an urgent investigation into whether Ms Banerji was "in fact the person using the handle @LaLegale" and, if so, into what he considered to be "serious breaches" of the APS Code of Conduct (**Code**) (**FM 17**). An investigation was initiated, and on 23 July 2012, Ms Banerji was informed that she was alleged to have breached the Code by (relevantly) making "public comment on issues associated with government policy and departmental programs such as immigration detention and processing of refugees" (**FM 38**).

9. On 13 September 2012, WRC issued its investigation report (**AF [18]**). Relevantly, the report (**FM 47**) stated that the following "circumstantial material" suggested that Ms Banerji was the LaLegale accountholder: (i) WRC had examined a plastic folder on her desk and found images of a woman's face "synonymous with" the LaLegale account ([19]-[20]); (ii) shortly after the investigation notice, LaLegale had tweeted asking if

anyone had experience defending a Code breach allegation "on account of Twitter postings" ([21]); and (iii) "DIAC records" indicated that Ms Banerji had been known as Michelina Ferraro ([4]), and a Facebook account for Michelina Ferraro displayed the LaLegale image and contained basic information "synonymous with" Ms Banerji ([22]).

10. ***Breach decision:*** On 15 October 2012, an authorised delegate determined that Ms Banerji had breached ss 13(1), (7) and (11) of the PSA (**breach decision**), and proposed to terminate her employment under s 15(1)(a) (**AF [21]; FM 182**). The breach decision rested "substantially" on s 13(11) (**T [123]**), and neither Comcare nor the Commonwealth seeks to support it by reference to s 13(1) or (7) (see **CS [3]**). The delegate explained that, from the circumstantial "evidence provided", she was "satisfied ... on the balance of probabilities" that the LaLegale account was Ms Banerji's (**FM 182**). The delegate also found that her tweets were "often highly critical of the Government, the Minister, the Immigration portfolio and ... [Mr] Logan" (**FM 182**).

11. The sole reason for the delegate's determination that Ms Banerji had failed to behave in a way that upholds the APS Values, and the integrity and good reputation of the APS, was that Ms Banerji had made "inappropriate online comments which were harsh and extreme in their criticism of the Government and DIAC administration to over 700 followers, many of whom are from the journalistic and political arena" (**FM 182**). This is consistent with the terms of the delegate's letter to Ms Banerji of 20 September 2012 (**FM 155**), which the delegate said "outlined" the reasons for her decision (**FM 182**). Although the breach decision did not identify any particular APS Value that Ms Banerji's conduct failed to uphold, the Tribunal appeared to treat s 10(1)(a) as the relevant value in this case, as do the Commonwealth and Comcare (**CS [8], [18]-[19]**).

12. The breach decision referred neither to the common law right of freedom of expression nor to the implied freedom of political communication.

13. On 26 August 2013, the delegate wrote to Ms Banerji (**26 August letter**) inviting her to provide a further response to the proposed sanction (**AF [33]**; **FM 255**). In Ms Banerji's response, she stated (inter alia) that it was "not contrary to the APS Code of Conduct to make critical comments of government under the implied freedom of political communication" ([11]), and that DIAC had "adduced no evidence to show that anything [she] might have said brought the department into disrepute" ([10]) (**FM 265**).

14. ***Termination decision:*** On 12 September 2013, the delegate determined that Ms Banerji's breach of the Code should be sanctioned by terminating her employment under s 15(1)(a) of the PSA (**termination decision**) (**AF [35]; FM 272**) because the "seriousness of [the] conduct and the risk of the conduct continuing in the future" meant that lesser sanctions were not appropriate (**FM 274**). Other reasons were set out in the breach decision and in the 26 August letter (**FM 273**). The latter stated that it was "clear that [Ms Banerji's] actions were inappropriate and inconsistent with the APS Values and Code of Conduct and the Department's social media guidelines"; she was aware of the social media policy (including through her work in DIAC's National Communications Branch) and nonetheless tweeted on the LaLegale account; she posted "material that related to the Department's policies and programs and government actions and actors" after being notified of the investigation into her conduct, which suggested she would "continue to post material in contravention of the APS Values, the Code and the Department's policies"; she had withdrawn earlier expressions of contrition; and her breaches were serious (**FM 256-257**; see similarly **FM 183-184**). Neither the 26 August letter nor the termination decision referred to the common law right of freedom of expression or the implied freedom of political communication.

15. ***Tribunal proceeding:*** On 18 October 2013, Ms Banerji made a workers compensation claim under s 14 of the SRC Act for a psychological condition arising from her termination of employment (**T [2]; AF [5]**). The parties agreed that the termination was reasonable administrative action taken in a reasonable manner unless Ms Banerji could establish that it fell outside the exclusion in s 5A(1) of that Act, "having regard to the implied freedom of political communication" (**AF [12]**). The latter question was the agreed issue arising for the Tribunal's determination (**AF [38]; T [4]-[6]**).

V ARGUMENT

16. Given [10]-[11] and [14] above, this Court should proceed on the basis that the delegate dismissed Ms Banerji in reliance upon ss 13(11) and 10(1)(a) (for the breach decision) and s 15(1) (for the termination decision) of the PSA. The first step is to interpret these provisions before examining their constitutional validity, although the constructional exercise must necessarily be undertaken with "an eye to"[2] the implied freedom.

[2] *Monis v The Queen* (2013) 249 CLR 92 (***Monis***) at [334] (Crennan, Kiefel and Bell JJ).

Construction

17. Section 13(11) of the PSA provides that "[a]n APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS". Of the APS Values set out in s 10, s 10(1)(a) provides that "the APS is apolitical, performing its functions in an impartial and professional manner". As the Commonwealth acknowledges (**CS [19], [20], [22]**), s 13(11) read with s 10(1)(a) captures communicative conduct by an APS employee, including communication on matters of politics and government. However, for these provisions to apply, there must be a nexus between the conduct and the APS as an institution. As such, these provisions do not apply to "**anonymous communications**" (cf **CS [23]**), in the sense of communications whose immediate context evinces no connection to the speaker's status as an APS employee (eg by giving her or his name, or position as a public servant).

18. That is, s 13(11) read with s 10(1)(a) should be construed as directed towards conduct that bears upon the APS as an institution in the performance of its functions and its external interactions with the third parties that it serves: "the Government, the Parliament and the Australian public" (s 3(a)). Communicative conduct can only uphold, or fail to uphold, the value in s 10(1)(a) if it is capable of altering the appearance or reality that the APS is institutionally apolitical and performs its functions impartially and professionally. And it can only uphold, or fail to uphold, the "integrity and good reputation of the APS" if it is capable of altering the appearance or reality of the APS's integrity and good reputation as an institution. By their nature, anonymous communications are incapable of producing these effects.

The text of ss 13(11) and 10(1)(a) of the PSA

19. This reading is consistent with the provisions' text viewed in their statutory context.

20. ***S 13(11) and upholding the APS Values:*** Section 13(11) requires an "APS employee" to "uphold" certain values described as "APS Values". Those values, articulated in s 10(1) in a Part of the Act entitled "The Australian Public Service", each consist of an asserted characteristic held and maintained by the institution described as "the Australian Public Service established by section 9" (see the definition of "APS" in s 7).

21. Some of those values can be described as "inward-facing": they manifest through the APS's internal processes, such as its provision of a "workplace that is free from discrimination" (s 10(1)(c)), and pursuit of "equity in employment" (s 10(1)(l)). Others

are "outward-facing": they manifest through the APS's engagement with, and through the regard in which it is held by, the persons and entities that it serves, such as the provision that the APS is "openly accountable for its actions" (s 10(1)(e)).

22. The value in s 10(1)(a) is of the latter kind. The words after "apolitical" confirm that s 10(1)(a) describes a characteristic of the APS in performing its functions. Thus, in its application to s 10(1)(a), the edict in s 13(11) for an APS employee to "behave in a way that upholds the APS Values" is an obligation to support the APS as an institution in providing services to the government, Parliament and the people in an apolitical, impartial and professional manner. It does not oblige APS employees to manifest personal qualities of political neutrality and impartiality in their daily existence.

23. Section 13(1)-(3) expressly requires APS employees to act with integrity, care and diligence and to treat everyone with respect in the course of APS employment whereas s 13(11) refers to upholding the APS Values "at all times". The latter expression is not as free of nuance as has been suggested, and should not be construed to mean that an APS employee must, at every moment in her or his life and regardless of the context, uphold the APS Values and the integrity and good reputation of the APS (cf **WA [11]-[14]; SA [18]**). Three points are to be made in this respect.

24. ***First***, given the focus of s 13 on the performance of duties in the course of APS employment, the Court should be slow to construe s 13(11) as uniquely extending to circumstances devoid of any connection whatsoever to employment. By way of analogy, this Court in *Nationwide News Pty Ltd v Wills*[3] construed s 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth) as limited to words calculated to bring a member of the Commission into disrepute as a member of the Commission, even though those limiting words were absent from that paragraph.

25. ***Second***, the expression "at all times" can be given work to do without accepting the extreme result contended for by Western Australia and South Australia. The expression is an emphatic statement of what is required whenever a person's conduct can have a bearing upon the APS as an institution. That conduct may be outside of work hours and the workplace. For example, if an identified or identifiable APS employee engages in a racist tirade, it is capable of damaging public perception of the APS's apolitical nature,

[3] (1992) 177 CLR 1 (***Nationwide News***) at 24 (Mason CJ), 37 (Brennan J), 66 (Deane and Toohey JJ), 84 (Dawson J), 92 (Gaudron J), 98-99 (McHugh J).

impartiality and professionalism irrespective of whether the employee engages in this conduct in her or his official capacity, or in her or his spare time. The person's identified or identifiable employment status provides a rational basis for members of the public, or the government, to conclude that the person is a member of the institution established in s 9 of the PSA, that the person's views represent views held or condoned by the APS itself, and that the APS therefore does not have or appear to have the characteristics specified in s 10(1)(a).[4] But to admit of this possibility is not to deny that some identifiable connection with the APS as an institution is required.

26. ***Third***, s 13(11) must here be read with s 10(1)(a), which says nothing about the attributes or opinions that an APS employee must personally display through her or his behaviour. In this context, the personal qualities and beliefs manifested by an APS employee are relevant only insofar as the employee's conduct affects the APS's status or appearance as an apolitical institution. Conduct consisting of communication is only capable of upholding, or failing to uphold, the APS's institutional characteristics of political neutrality described in s 10(1)(a) if the speaker's name or status as an APS employee is discernible from the communication's immediate context – in other words, if it is not an anonymous communication. This is because an expression of a political view can have no effect on the APS being apolitical or on the APS's actual or perceived impartiality vis-à-vis the government, Parliament and the people unless that conduct itself provides some means by which the view expressed can rationally be ascribed to the APS. An anonymous communication "cannot rationally be used to draw conclusions about the professionalism or impartiality of the public service" (**T [116]**).

27. The fact that the anonymous speaker may, by reason of some third party's conduct, subsequently be "revealed to be a member of the APS" is irrelevant (cf **CS [23]**). Where, as here, anonymity is dissolved by the employer examining a folder of personal material on the anonymous speaker's desk, it is that employer, not the employee, who has threatened, or connected the impugned conduct with, the APS's apolitical image. This follows from properly characterising the employee's conduct and analysing it at the

[4] Cf *Affaire Catalan c. Roumanie* (ECHR, 13003/04, 9 January 2018, available in French). A civil servant provided sensitive documents to the press. In an article, the press gave his name, explained that he had provided them in his capacity as a historian, and attributed some commentary on the documents to him ([10]-[11]). His employment was terminated. In holding that the interference with his freedom of expression was justified to protect the rights of his employer, the Court found that, although the article did not mention his employment status, the press, which knew that he was a civil servant, had widely published his remarks, and his statement could easily have been perceived by the public as his employer's official position or, at least, as having come from his employer ([71]).

appropriate point in time. Whether an APS employee has "behave[d]" in a way that "upholds" the APS Values (s 13(11)) is to be evaluated when the impugned behaviour occurs. This aligns with other elements of the Code: for example, an employee does not breach s 13(9) by providing information that later turns out to have been misleading, or breach s 13(4) by failing to comply with a law later passed with retrospective effect.

28. ***S 13(11) and upholding the APS's integrity and good reputation:*** Section 13(11) also requires an APS employee to uphold "the integrity and good reputation of the APS". This directs attention to the reality ("integrity") and appearance ("good reputation") of the APS's high standing and ability to serve the government, the Parliament and the public in an apolitical manner (see s 3(a)). Section 13(11) does not in terms require APS employees personally to act in accordance with a given standard or maintain a particular reputation (cf ss 13(1)-(3)): their conduct is only covered by s 13(11) if it is capable of affecting the integrity and reputation of the institution.

29. For the reasons given at [26] above, an APS employee's communicative conduct can only uphold or fail to uphold the APS's integrity and good reputation as an institution if that person's employment status is identified in or identifiable from the immediate context of the conduct itself. Without that association, the communication cannot affect the APS's "integrity" or "good reputation" (cf **CS [23]**). Such an anonymous communication is no more capable of failing to "uphold" the APS's high standing as is a private citizen's expression of political views or criticism of the APS. There is nothing about the person's status as an APS employee, being the class of persons regulated by the Code and through whom the APS as an institution serves the government and the public, that is germane to the character of the communication. That communication cannot bear upon the APS's integrity or reputation in the manner envisaged by s 13(11).

30. The suggestion that s 13(11) applies to mere anonymous criticism of the APS (**CS [23]**) should not be accepted absent clear words, given the importance of public criticism and discussion of government and political matters. The APS is not so fragile that its integrity and good reputation cannot withstand anonymous criticism.

The purpose of ss 13(11) and 10(1)(a)

31. ***Objects of the PSA:*** The objects of the PSA as a whole favour the construction set out at [17] above. The central object is "to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian

public" (s 3(a)). To that end, the Act creates "the Australian Public Service", consisting of "Agency Heads" and "APS employees" (s 9). An "Agency Head" is the Secretary of a Department, or Head of an Executive Agency or Statutory Agency (s 7). An "APS employee" (s 7) is a person engaged as an employee for the purposes of an Agency (s 22(1)) or assigned to an Agency as part of machinery of government changes (s 72).

32. As well as establishing the APS, the statute also regulates the individuals constituting it: relevantly, it seeks "to provide a legal framework for the effective and fair employment, management and leadership" (s 3(b)), and to "establish rights and obligations" (s 3(d)), of APS employees. However, the Act regulates those persons not as an end in itself, but as part of the broader goal of creating a well-functioning civil service. As reflected in the long title and in the apparent hierarchy of the purposes described in s 3, the government apparatus constituted and regulated by the PSA has both an outward-facing and an inward-facing operation, the latter being a tool for achieving the former. The Act provides for the "management ... of the Australian Public Service" – but that is secondary to "the establishment ... of the Australian Public Service", an institution dedicated to serving the government and the people.

33. ***Objects of ss 13(11) and 10(1)(a):*** The Commonwealth indicates that the purpose of s 13(11) is "the pursuit of a politically neutral public service" **(CS [26])**. Correctly, no suggestion is made that the provisions pursue politically neutral people to staff the APS. Thus, the specific purpose of these provisions favours Ms Banerji's construction.

Legislative history

34. The construction described at [17] above is consistent with s 13(11)'s legislative history. That provision's lineage can be traced to reg 34 of the regulations made under the *Public Service Act 1922* (Cth) **(1922 Regulations)**. Regulation 34, entitled "Public comment on administration", relevantly provided in para (b) that an officer shall not "publicly comment upon any administrative action or upon the administration of any Department: provided that nothing in this paragraph shall prevent an officer resident in any Territory within the Commonwealth from publicly commenting upon civic affairs relating to that Territory".[5] Paragraph (b) was repealed in 1974;[6] reg 34 was repealed in its entirety and

[5] *Public Service Regulations* in force under the *Public Service Act 1922-1972* (Cth), reg 34 at 1 December 1972.
[6] Statutory Rules 1974 No 98 (Cth).

replaced by regs 8A and 8B in 1987, made by the Public Service Board (**Board**);[7] and regs 8A and 8B were replaced in 1999 by the Code established by s 13 of the PSA.

35. The Explanatory Statement to the 1987 Regulation (**1987 ES**) explained that the previous reg 34 had "restricted officers from making public comment except in the discharge of their official duties", and that a sub-committee of the Joint Council of the APS (**Joint Council**) had recommended its amendment "so as to *change 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".[8] The 1987 ES relevantly continued (at p1) that new reg 8A "updates the expression of the duties of public servants, taking into account the relevant elements of" Recommendation 199 of the Royal Commission on Australian Government Administration (**RCAGA**). Notably, in its 1976 Report, the RCAGA: proposed the introduction of statutory rights and duties of Commonwealth employees ([8.5.44]); recommended that, "except as expressly provided by an Act or regulation made under the Act, or as is necessary for the proper performance of his duties, a government employee should be free to exercise the civil and political rights, liberties and privileges generally enjoyed by citizens" ([8.5.55]); and, in Recommendation 199, framed a list of duties ((a)-(h)) which it considered warranted specific mention in the then Public Service Act ([8.5.64]). The proposed duty most similar to what became reg 8A(i) was set out in para (g): "a person employed shall not behave in his official capacity in a manner amounting to improper conduct" (**duty (g)**). After listing its proposed duties, the RCAGA said ([8.5.65]):

> The Commission has given serious thought to whether the duties referred to in the Act should refer in any way to improper conduct outside the performance of professional duties, that is in the private life of the officer concerned. While the Commission can envisage circumstances in which such conduct could impair the officer's capacity to perform his work efficiently or could bring the Service into disrepute, it has decided not to recommend any specific reference to obligations in respect of private behaviour. We believe such behaviour is relevant only in so far as it bears generally or specifically upon the performance of official duties[.]

36. These duties each found a rough parallel in what became regs 8A-8B of the 1922 Regulations.[9] Duty (g) became the following: an officer shall "at all times behave in a manner that maintains or enhances the reputation of the Service" (reg 8A(i)). Reading reg 8A(i) in light of the RCAGA's discussion of its proposed duties, which the 1987 ES stated had provided the model for new reg 8A, it can be inferred that the Board

[7] *Public Service Regulations (Amendment)*, Statutory Rules 1987 No 137 (Cth) (**1987 Regulation**).
[8] Explanatory Statement to Statutory Rules 1987 No 137 (Cth) at p1 (emphasis added).
[9] See duty (a) cf reg 8A(c); duty (b) cf reg 8A(a); duty (c) cf reg 8A(g); duty (d) cf regs 8A(h) and 8B; duty (e) cf reg 8B; duty (f) cf reg 8A(f); duty (g) cf reg 8A(i); duty (h) cf reg 8A(b).

considered that it was appropriate to regulate "private behaviour" of APS officers only in limited circumstances, being where the behaviour "bears generally or specifically upon the performance of official duties" and thereby "brings the Service into disrepute".

37. Over a decade later, the Public Service Bill 1999 introduced a new declaration of APS Values (s 10) and a statutory Code of Conduct (s 13) that built on the duties contained in regs 8A and 8B of the 1922 Regulations.[10] The 1999 EM explained that the new APS Values were designed to (inter alia) "provide the philosophical underpinnings for the APS" and "reflect public expectations of the relationship between public servants and the Government, the Parliament and the Australian community (cf objects in Bill para 3(a))" ([3.4]). It noted that new s 13(11) was "wider than" former reg 8A(i) ([3.14.14]). The additional "width" in s 13(11) was the new requirement to uphold the APS Values. In its discussion of the new disciplinary framework to enforce breaches of the Code (s 15), the 1999 EM also noted previous Joint Council recommendations that "the primary aim of disciplinary provisions should be to facilitate efficient administration and public confidence in the integrity of the administration", and that "there should be no unnecessary concern with the private lives of staff members" ([3.17.2]).

38. This legislative history indicates that, since former reg 34(b)'s repeal, the Board and then Parliament have proceeded on the basis that the public service legislation does not seek to regulate the conduct of APS employees outside the course of their employment except insofar as it could directly cause damage to the APS's institutional characteristics or to public perceptions of the APS's integrity or impartiality. Most significantly, as the 1987 ES demonstrates, the prohibition on public comment by APS officers was repealed upon the Joint Council's recommendation, and the Board did not seek to reintroduce it through new reg 8A. The history supports a narrow reading of ss 13(11) and 10(1)(a) that does not intrude upon APS employees' communicative conduct unless that conduct has an identifiable connection with the "relationship between public servants and the Government, the Parliament and the Australian community". It supports a reading that excludes anonymous communications from the scope of s 13(11).

Interpretative presumptions

39. Finally, and critically, the construction advanced at [17] above is required by two interpretive principles. ***First***, "the principle of legality "favours a construction, if one

[10] See Explanatory Memorandum to the Public Service Bill 1999 **(1999 EM)** at [3.14.1]-[3.14.17].

be available, which avoids or minimises the statute's encroachment upon fundamental principles, rights and freedoms at common law",[11] and thus a construction that "has the least adverse impact upon ... common law freedom of speech".[12] That long-established freedom is "never more powerful than when it involves the discussion and criticism of public authorities and institutions".[13] Accordingly, "the curtailment of free speech by legislation directed to proscribing particular kinds of utterances in public will often be read as 'narrowly limited'",[14] and the displacement of the freedom will be effected only by "clear language which permits no other outcome".[15] This principle applies with particular force where "the common law right in question is protected by an implied constitutional freedom, such as that expressed in *Lange*".[16]

40. ***Second***, "in the event of ambiguity, a construction of legislation should be preferred which avoids incompatibility with the Constitution".[17] Specifically, where a provision "may be construed so that it conforms to the *Lange* freedom, and does not infringe the constitutional implication, it should be so construed".[18] In *Coleman*, for example, several judges interpreted the impugned prohibition on the use of insulting words "so as to restrict its sphere of operation, with the result that it met the *Lange* test".[19]

41. Both principles require a narrow construction of ss 13(11) and 10(1)(a) of the PSA. The alternative reading of those provisions is that a person who is an APS employee may contravene s 13(11) if, in any context (including by way of anonymous communication), the person expresses political views or criticises the Government/APS. On this reading, the expression of those views or criticisms is necessarily behaviour that does not "uphold" the APS's political neutrality and/or its good reputation and integrity.[20] This reading would effect an extraordinary intrusion into freedom of expression. It would, in practice, prevent APS employees from communicating political views in circumstances with no possible connection to their employment (cf **CS [22]**) – and the

[11] *NAAJA Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).
[12] *Hogan v Hinch* (2011) 243 CLR 506 at [5] (French CJ); see also *Nationwide News* at 31-32 (Mason CJ); *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 (***Adelaide City***) at [151]-[152] (Heydon J).
[13] *Adelaide City* at [43] (French CJ).
[14] *Coleman v Power* (2004) 2201 CLR 1 (***Coleman***) at [188] (Gummow and Hayne JJ, emphasis added).
[15] *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) at [28] (French CJ).
[16] *Coleman* at [251] (Kirby J).
[17] *Coleman* at [225] (Kirby J).
[18] *Coleman* at [227] (Kirby J).
[19] *Monis* at [286] (Crennan, Kiefel and Bell JJ).
[20] See, by analogy, *Cooper v Australian Taxation Office* [2014] FWC 7551 at [50]-[51], disapproved in *Cooper v Australian Taxation Office* [2014] FWCFB 868 at [18]-[19].

Commonwealth's context-dependent analysis is no antidote, as whether a given communication amounted to a failure to uphold the characteristics described in s 13(11) is uncertain at the time of the communication.[21] It would, in practice, reintroduce and expand the prohibition on public comment contained in former reg 34(b) of the 1922 Regulations. As discussed below, it would burden the implied freedom in a manner that is not appropriate and adapted to the end of preserving the effectiveness and integrity of the permanent professional public service or (similarly) maintaining a politically neutral APS (**CS [8], [26]**). The construction described at [17] above is to be preferred.

Section 15(1) of the PSA

42. Section 15(1) of the PSA provides that an Agency Head may impose a prescribed sanction on an APS employee in the Agency who is found, by procedures under s 15(3), to have breached the Code. As the word "may" and the general subject matter suggest, that power is discretionary. It is up to the Agency Head to determine what sanction if any to apply. The provision therefore attracts, in the absence of any contrary indication, the usual presumption that "[t]he legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably"[22] and "in accordance with any applicable law, including the *Constitution* itself".[23] It is like a provision impugned in *Wainohu v New South Wales*,[24] which the plurality considered permitted "the restriction of control orders so as not unreasonably to burden freedom of political communication", meaning that "the power of the Supreme Court to make a control order should be construed conformably with the implied freedom so as to render reviewable for error any particular order which exceeded the limit of the implied freedom".

43. ***McCloy/Brown framework:*** An exercise of discretionary power that restricts political communication will exceed the limit of the implied freedom where the decision is not: (a) made for a legitimate purpose, (b) rationally connected to that purpose, (c) no more than reasonably necessary to achieve the purpose, and (d) adequate in the balance struck between the importance of the purpose and the impact on the freedom. That is, in evaluating the exercise of power against the implied freedom that limits the statutory

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[21] Cf *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) at [144]-[145] (Kiefel CJ, Bell and Keane JJ).
[22] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [63] (Hayne, Kiefel and Bell JJ). See also at [24]-[26] (French CJ), [88]-[92] (Gageler J).
[23] *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at [9]; see also at [10], [22]-[23] (French CJ, Gummow, Hayne, Crennan and Bell J); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614 (Brennan J).
[24] (2011) 243 CLR 181 at [113] (Gummow, Hayne, Crennan and Bell JJ).

provision on its proper construction, the *McCloy/Brown* framework applies. It does so because proportionality as "a class of criteria"[25] has been applied to administrative decision-making,[26] and no more transparent tools of analysis have been fashioned to date (cf **CS [57]**). This framework also reflects the approach taken elsewhere.[27] The Commonwealth's suggestion (**CS [52]-[53]**) that it is unnecessary to consider compatibility, suitability and necessity is too focused on taxonomical or theoretical purity. Inevitably, when confronted by a challenged decision, a reviewing court will assess the purpose of the decision, its connection with that purpose and whether it went further than was reasonably necessary. These are facets of disproportionality which should be teased out in the interests of transparent and accountable decision-making.

44. Undertaking the judicial review task in this way does not treat the implied freedom as a personal right (cf **CS [55]**). A decision on whether the burden in Ms Banerji's case was permissible "acquires a permanent, larger, and general dimension",[28] because that decision will determine whether it would be permissible for others similarly situated to be burdened in the same way. The systemic considerations protected by the implied freedom dovetail with this administrative law analysis because the statute does not authorise a pattern of decision-making that would unjustifiably distort the flow of political communication to or from the people, and an individual decision is representative of the larger pattern that would emerge unless the constitutional limitation on the power is enforced. To the extent that this approach might appear on its face to protect personal rights of communication, then that is simply a consequence of the judiciary enforcing the limits set by the Parliament as described at [42] above.[29]

45. ***Relevant considerations:*** The limit will also be exceeded where the decision-maker fails to consider the implied freedom at all.[30] There is no difficulty in conceptualising the implied freedom, additionally and not solely, as a mandatory relevant consideration (contra **CS [57]**). Administrative decision-making that inadvertently complies, as a matter of substance, with the implied freedom without any active consideration having been given to that limit on power has little to commend it. Indeed, a failure to consider

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[25] *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [3] (French CJ, Kiefel, Bell and Keane JJ). See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (***Murphy***) at [32] (French CJ and Bell J).
[26] See, eg, *Li* at [30] (French CJ); see also at [72], [74] (Hayne, Kiefel and Bell JJ).
[27] See, eg, *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [20], [74], [132], [166]-[167]; *Christian Institute v Lord Advocate* [2016] UKSC 51 at [90]-[94].
[28] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [158] (Gummow, Crennan and Bell JJ).
[29] See *Chief of Defence Force v Gaynor* (2017) 246 FCR 298 (***Gaynor***) at [80] (per curiam).
[30] See *Wotton* at [88] (Kiefel J); *Gaynor* at [80] (per curiam).

the implied freedom is likely to be of considerable evidentiary significance in finding that the "ultimate limit on power" (cf **CS [57]**) has been exceeded. Doctrinally, it is well open to find that the implied freedom is a mandatory relevant consideration whenever communicative conduct is sought to be sanctioned, and there must be a constructive failure of jurisdiction where such a significant limit on power is not given "proper, genuine and realistic consideration".[31] A failure to consider the implied freedom is thus a more specific species of disproportionality, itself a species of unreasonableness.[32]

The termination decision was not authorised by ss 13(11) and 15 of the PSA

46. ***Section 13(11):*** For the reasons explained at [17]-[41] above, s 13(11) read with s 10(1)(a) cannot apply to Ms Banerji's conduct consisting of anonymous communications, as these are incapable of affecting the appearance or reality of (i) the APS's institutional status as an apolitical body that performs its functions impartially and professionally, or (ii) the APS's integrity and good reputation as an institution.

47. Ms Banerji's tweets from the LaLegale account were all "anonymous" in the relevant sense (**T[92]-[94]**). This Court can accept, as the Tribunal apparently did (**T [92]-[94]**), that, at the time Ms Banerji engaged in the conduct found to have breached s 13(11) of the Code, it was not possible from that conduct itself (the making of the tweets) to ascertain her identity or her status as an APS employee. So much is clear from the content of the tweets and of the LaLegale twitter profile (see [6] above); from the third party tweet on 5 March 2012 extracted at [7] above, which suggests that the user is unaware that Ms Banerji has any connection to Mr Logan or DIAC; and from the extent of the investigations, using DIAC internal databases and material physically stored on Ms Banerji's desk, that DIAC needed to deploy to provide even "circumstantial" evidence connecting Ms Banerji with the LaLegale account (see [8]-[9] above). As such, for the purposes of s 13(11), her conduct was incapable of affecting or reflecting upon the APS's political neutrality or its integrity and good reputation as an institution. No finding of breach of that provision was reasonably open on a proper understanding of the law. Accordingly, the breach decision was not authorised by s 13(11), and an essential precondition to the termination decision was not present, rendering the latter decision *ultra vires*. The Tribunal should have so concluded (cf **T[123]-[125]**).

[31] *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 at [43] (Kiefel, Bell, Keane, Nettle and Gordon JJ).
[32] Cf *Li* at [72] (Hayne, Kiefel and Bell JJ).

48. ***Section 15(1):*** The breach decision was thus invalid, and the consequence is that there is no decision at all.[33] As just explained, it follows that the termination decision under s 15(1) was invalid, because a valid breach decision was an essential precondition for enlivening the delegate's power to terminate Ms Banerji's employment under s 15(1). But separately, the decision under s 15(1) is invalid for two additional reasons.

49. ***First***, the decision-maker gave no explicit or implicit consideration to the implied freedom, despite recognising that many of Ms Banerji's tweets were "about policy" and that "many of [her] followers are from the journalistic and political arena" (see [11], [14] above). The omission to refer to the implied freedom is therefore striking.

10 50. ***Second***, the termination decision is of a kind that burdened free communication on political matters, by requiring a public servant to pay a serious price for political comment – but it did not satisfy the elements of compatibility and proportionality testing described at [43] above. One can infer from the terms of the decision and supporting documents that the sanction was imposed because Ms Banerji criticised the Government to a wide public audience (see [11] and [14] above). To punish for criticism is not to act for a purpose compatible with the freedom.[34] If, alternatively, the purpose of the termination was to uphold the apolitical nature of the APS as an institution, as well as its integrity and reputation, then there was no rational connection between that end and the termination. Ms Banerji's anonymous communications could have had no bearing
20 upon the APS as an institution. Further, other alternatives were available under s 15(1) that would have required Ms Banerji to pay a lesser "price"[35] for her communications. For example, if her role in the National Communications Branch was truly significant to the decision, then she may have been reassigned to a different branch. Finally, in the circumstances set out at [47] above and for the reasons given at [60] below, the serious sanction of termination for Ms Banerji's conduct was inadequate in its balance.

Alternatively, ss 13(11) and 15(1) impermissibly burden the implied freedom

51. If ss 10(1)(a), 13(11) and 15(1) authorised Ms Banerji's dismissal, then they are invalid insofar as they purport to authorise sanctions against an APS employee for "anonymous

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[33] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [41]-[43] (Gaudron and Gummow JJ).
[34] Cf *Tajjour* at [28] (French CJ); *Nationwide News* at 32 (Mason CJ), 51-53 (Brennan J), 78-79 (Deane and Toohey JJ), 91 (Dawson J), 95 (Gaudron J), 102-103 (McHugh J).
[35] *Gaynor* at [105] (per curiam).

communications" in the sense described above. To construe those provisions as permitting those sanctions is to impermissibly burden the implied freedom.

Question one: Burden

52. There is no dispute that these provisions burden the freedom (**CS [19]**). The provisions restrict public servants from engaging in political communication "at all times", when that conduct has a bearing upon their status as APS employees and even when it does not (recalling that this question arises in part to inform the constructional exercise above, and in part if the interpretative issues are answered adversely to Ms Banerji).

53. The burden discriminates against a particular source of information on political and governmental matters: APS employees. It is necessary therefore for Comcare and the Commonwealth to justify that differential treatment of that particular class of persons – a class that appears to cover approximately 240,700 people on June 2018 census data, or around 1% of the Australian population as at 30 June 2017.[36] Specific justification is required, because "a free flow of communication between all interested persons is necessary to the maintenance of representative government".[37] "[E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia".[38] Public servants are especially well placed to contribute in an informed manner to public debate on "Ministers and the public service", which is a topic at the core of the implied freedom.[39] "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."[40]

54. The Commonwealth claims that public servants can be singled out for burdens on political communication "because the imposition of such burdens ... promotes the functioning of the system of government for which the Constitution provides" (**CS [16]**). But it must show that this objective is connected to and advanced by the particular

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[36] ABS, "6248.0.55.002 - Employment and Earnings, Public Sector, Australia, 2017-18", http://www.abs.gov.au/ausstats/abs@.nsf/mf/6248.0.55.002/; ABS, "3222.0 - Population Projections, Australia, 2017 (base) – 2066", http://www.abs.gov.au/ausstats/abs@.nsf/0/5A9C0859C5F50C30CA25718C0015182F?Opendocument.

[37] *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at [27]; see also at [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 139 (Mason CJ).

[38] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 571 (per curiam).

[39] *Lange* at 561, 571 (per curiam).

[40] *Waters v Churchill*, 511 US 661 at 674 (1994). See also *City of San Diego v Roe*, 543 US 77 at 80, 82 (2004); *Garcetti v Ceballos*, 547 US 410 at 421; *Lane v Franks*, 573 US __ at 10-11 (2014).

provisions impugned here.[41] Not every law restricting public servants' political speech could bear on the Executive government's performance of its constitutional role (cf **CS [15]**). A law banning public servants from discussing politics with their families around the dinner table is an example. This question of connection is further explored below.

Question two: Compatibility testing

55. The Commonwealth contends that the purpose of these provisions is to uphold the APS Values (and more particularly, an apolitical public service) and the integrity and good reputation of the APS (**CS [25]-[26]**). Ms Banerji does not contest that this is a legitimate purpose for the Commonwealth to pursue when understood properly: the Commonwealth has a legitimate interest in the APS having, and being regarded as having, high standing in the provision of services to the Government, the Parliament and the Australian people, and in those services being provided without APS employees being influenced by party political considerations. But this is not to accept that the Commonwealth has any legitimate interest in cleansing APS employees of political opinions (see **CS [22]**) or of the ability to express them in ways that do not have a bearing upon the APS as an institution. Nothing in the constitutional text and structure, or our history, demands or permits any such radical proposition.

56. ***First***, the systemic ends identified by the Commonwealth (**CS [26]**) explain why, in the provision of services, it is open to the Commonwealth to pursue a politically neutral public service. They do not, however, support any interest in regulating conduct with no bearing upon the provision of services because the APS employee engaged in the impugned conduct in circumstances that could not be connected with her status as an APS employee. If the conduct cannot be identified to be that of an APS employee, then it will not affect the confidence that the Commonwealth says the Government must have in APS employees. If the conduct cannot be attributed to an identifiable APS employee, then it should have no impact upon management, staffing or promotional decisions.

57. ***Second***, the history of British, colonial and post-federation regulation of the public service to which the Commonwealth points is of limited assistance (**CS [27]-[34]**). Not all of that historical debate touched upon the issue of public comment by public servants.[42] Where public comment was regulated, that was not uncontroversial, and the

[41] See *Unions No 1* at [53]-[60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[42] Neither the Trevelyan Report nor the 1857 Report referred to at **CS [27]-[28]** did so.

regulations underwent substantial development over time.[43] The history does not reveal any static or fixed view that public comment by public servants without any connection with the public service is necessarily impermissible; the history is more nuanced and fluid. Similarly, "the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society. That requires an examination of changing circumstances".[44]

Question three: Justification

58. ***Suitability:*** This case is not unlike *Unions No 1*, where "the purpose of Pt 6 of the EFED Act was accepted as legitimate", but "the provisions of Pt 6 in question ... were held to be invalid because they could not be seen as rationally connected to that purpose".[45] Anonymous comment of the kind engaged in by Ms Banerji has no connection with the person's status as an APS employee and, thus, no connection with the delivery of services by the APS as an institution in an apolitical manner. To regulate such conduct is not, therefore, to make any contribution to the end pursued. If the relevant provisions of the PSA extended to regulating such conduct, they would lack a rational connection to the legitimate end identified by the Commonwealth. Indeed, where communications are sufficiently anonymous, the sting of that communication for the APS Values and for APS's integrity and good reputation as an institution is no different whether the communication is made by an APS employee or not.[46] Singling out APS employees in the conduct of their private lives in this way lacks a rational explanation.

59. ***Necessity:*** In a similar vein, a reasonably available alternative is <u>not</u> to regulate anonymous communications. That achieves the legitimate end to the same extent because the regulation of those communications does not contribute to realisation of that end in the first place. No "area of immunity" **(CS [37])** is created for conduct that "undermine[s] the APS Values and the integrity and good reputation of the APS", because anonymous conduct does not threaten those Commonwealth interests.[47]

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[43] R Plehwe, "Political Rights of Victorian Public Employees" (1983) 42 *Australian Journal of Public Administration* 362; V Subramaniam, "Political Rights of Commonwealth Public Servants" (1958) 17 *Public Administration* 22 at 30; R Parker, "Official Neutrality and the Right of Public Comment" (1964) 23 *Australian Journal of Public Administration* 193; Ontario Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (1986) at 248-252.
[44] *Lange* at 565 (per curiam); *ACTV* at 158 (Brennan J); *Murphy* at [90]-[92] (Gageler J).
[45] *McCloy* at [9] (French CJ, Kiefel, Bell and Keane JJ).
[46] Compare the example in *Brown* at [221] (Gageler J).
[47] Cf *Brown* [140]-[142] (Kiefel CJ, Bell and Keane JJ).

60. ***Adequacy in balance:*** The provisions of the PSA, in their purported application to anonymous communications, are disproportionate, and (if necessary to establish) grossly so, to the legitimate end identified by the Commonwealth. ***First***, the provisions effect a "severe restriction"[48] on APS employees, in that they purport to extend to communications that have no bearing upon or connection with their status as an APS employee at all (cf **CS [40]**).[49] ***Second***, history is of limited assistance for the reasons given above (cf **CS [39]**). ***Third***, the review mechanisms in place for an APS employee to challenge his or her termination do not remedy the underlying defect (cf **CS [41]**); the constitutional flaw resides in the very application of these provisions to anonymous communications. ***Fourth***, that people voluntarily enter the APS does not justify the burden, if there is no proper basis to ask prospective employees to sacrifice the capacity to engage in potentially any political communication in the private sphere as a condition of serving the Government, the Parliament and the people. The Commonwealth cannot by agreement circumvent the implied freedom. And to ask for that sacrifice sits ill with the historical pursuit of suitably qualified and engaged persons to public service.

61. By either route described at [3] above, the PSA did not validly authorise termination of Ms Banerji's employment. The Tribunal thus correctly concluded that the termination did not constitute reasonable administrative action taken in a reasonable manner within s 5A of the SRC Act, and Comcare's appeal should be dismissed with costs.

VI NOTICE OF CONTENTION

62. As regards her notice of contention (**CAB 89**), Ms Banerji relies upon [17]-[50] above.

VII ESTIMATE OF TIME

63. Ms Banerji estimates that she will require 2.5 hours for her oral submissions.

Dated: 5 December 2018

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[48] *ACTV* at 146 (Mason CJ).
[49] Cf *Osborne v Canada* [1991] 2 SCR 69 at 100 (Sopinka J).