IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY

NO C12 OF 2018

COMCARE

Appellant

and

MICHAELA BANERJI

Respondent

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

Filed on behalf of the Attorney-General of the Commonwealth (intervening)

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Respondent should not be permitted to rely on Notice of Contention (NoC)

1. The proceedings below were limited to one issue (**CAB 11.5**). The respondent seeks to put a new *factual* argument that was not put below (**RS [17]–[18], [47]**). Additional evidence would have been relevant to that argument such that it would be inimical to justice to allow it: *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51].

II. Q1: Sections 13(11) and 15 of the PS Act are valid in all their operations

2. The constitutional foundation for the implied freedom is supplemented in the present context by the constitutional provisions that contemplate a public service as an integral part of the system of government that the Constitution mandates: ss 64, 67 and 44(iv). Protection of this system means that a burden on the communication by public servants may be more readily justified than similar burdens on other groups: *McCloy v NSW* (2015) 257 CLR 178 (**Vol 5, Tab 30**) at 208 [47]; 221 [93].

3. The implied freedom is not a personal right: cf AAT [7], [67], [117]–[120] (**CAB 12, 44, 61**); *CDF v Gaynor* (2017) 246 FCR 298 (**Vol 4, Tab 22**) at **[47]–[48], [63]**.

4. Section 13(11), read with s 10(1)(a) of the PS Act, effectively burdens the free flow of political communication. The communications burdened are the same regardless of the penalties under s 15: *Brown* (2017) 261 CLR 328 (**Vol 3, Tab 21**) at [259] (Nettle J).

5. The nature and extent of the burden on political communication is determined by proper construction of the PS Act. Sections 10(1)(a) and 13(11) do not require public servants to be devoid of political opinions. The word "apolitical" derives meaning from the syntax of s 10(1)(a), and concerns what is necessary for the APS to perform its functions in an impartial and professional manner: see also *Public Service Commissioner's Directions 1999* (Cth) at 2.2(2). APS employees are restricted only to the extent that their behaviour may undermine that capacity. However, such behaviour is not limited to behaviour that occurs in the course of employment: *McManus v Scott-Charlton* (1996) 70 FCR 16, 19D, 23-26 (**Vol 5, Tab 31**); *FCT v Day* (2008) 236 CLR 163 at [5]–[9], [33], [34], [35] (**Vol 4, Tab 25**).

6. Properly construed, ss 10(1)(a) and 13(11) are directed to conduct that undermines the integrity and effectiveness of the APS, and they limit political communication only for that purpose and to that extent. The obligation created varies according to contextual factors such as seniority, whether the comment is about a public servant's own agency/Minister, when and where comment is made, and language and tone (**CS [22]**).

7. **There is no "bright line" around "anonymous conduct"** (cf **RS [17], [26]–[27], [51], [59], [60]**). The Respondent's argument to the contrary must be rejected as it: (i) has an unjustifiable temporal component; (ii) fails to account for variations in what might be contended to be "anonymous"; and (iii) has no textual foundation in the PS Act. The Respondent should have been aware that there is no such "bright line": Public Service Commissioner's Policy Guidelines, upon which the Tribunal relied: AAT [37] (**CAB 23–26**) and AAT [13]–[14] (**CAB 15**).

8. **Compatible purpose:** The purpose of ss 10, 13 and 15 of the PS Act is the maintenance of an apolitical, impartial and professional public service that is efficient and effective in serving the government, the Parliament and the Australian public, and maintaining public confidence in that service: AAT [74] (**CAB 45**). The legitimacy of that purpose is confirmed by Commonwealth practice since Federation (**CS [30]–[34]**).

9. **The PS Act is reasonably appropriate and adapted to that legitimate purpose**. The impugned provisions are valid. **Suitable:** The requirement that public servants uphold the good reputation of the APS is rationally capable of achieving purpose (**CS 36**). **Necessary:** there is no obvious and compelling alternative that has a significantly less restrictive effect on the freedom (**CS 37**, cf **RS [59]**). **Adequately balanced**: There are four relevant matters: (i) like provisions have long been regarded as performing a central role in maintaining the apolitical nature of the public service; (ii) the provisions operate by reference to the character and effect of the conduct: *CDF v Gaynor* (2017) 246 FCR 298 at [106]–[112] (**Vol 4, Tab 22**); (iii) procedural protections are in place: **CS [41]**; *Code of Conduct Procedures* (July 2013); *Wotton* (2012) 246 CLR 1 at [32], [88]–[91] (**Vol 8, Tab 43**); (iv) the burden is limited to public servants, being a class of persons who enjoy special advantages and protections and correspondingly submit themselves to certain restrictions: (**CAB 48–49, 58**).

10. **Alternative submission on Q1:** if the sanction imposed under s 15(1) is relevant to determining the nature and extent of that burden, the provisions are nevertheless valid.

The main difference in analysis is that the burden varies depending on the discretionary decision of the administrator. However, the PS Act only authorises sanctions that are proportionate to contravention of s 13(11) (**CS 43-45**).

III. Q2: If ss 13(11) and 15(1) are 'susceptible in their exercise' then the exercise of discretion in this case was within the scope of s 15(1) of the PS Act

11. The premise for this branch of the argument is that ss 13 and 15(1) together confer a power which attracts the principle of construction identified in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 611-614 (**Vol 5, Tab 32**); *Wotton* (2012) 246 CLR 1 at [10], [21]–[23] (**Vol 8, Tab 43**); *Sportsbet v NSW* (2012) 249 CLR 298 (**Vol 6, Tab 38**) at 316 [12]. 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 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: *Wainohu v NSW* (2011) 243 CLR 181 (**Vol 7, Tab 41**) at 231 [113]; *Victoria v Commonwealth* (1996) 187 CLR 416 (**Vol 7, Tab 40**) at 502-503 (**CS 47-50**).

12. **All *Lange/McCloy* steps not necessarily required**: When assessing the validity of particular decisions made under statute, it is generally unnecessary to repeat the analysis of compatibility and suitability already undertaken at the level of the statute. In this statutory context, the same is true of necessity testing, because s 15 ensures a sanction cannot exceed what is necessary for the statutory purpose: (**CS [53], [45]**). By contrast, in assessing adequacy of balance it may be necessary to *complete* the constitutional analysis by reference to impugned administrative decision. The inquiry is: '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 be grossly disproportionate to or as otherwise going far beyond what can reasonably be justified in pursuit of the statutory purpose?': *Brown* (2017) 261 CLR 328, 422-3 (**Vol 3, Tab 21, CS 56**).

13. **The *Lange/McCloy* steps are not mandatory considerations:** *A v ICAC* (2014) 88 NSWLR 240, 257 [56] (**CS 57**).

Date: 20 March 2019

Stephen Donaghue **Craig Lenehan** **Julia Watson**