

IN THE HIGH COURT OF AUSTRALIA  
CANBERRA REGISTRY

No. C12 of 2018

BETWEEN:



**COMCARE**

Appellant

and

10

**MICHAELA BANERJI**

Respondent

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE  
STATE OF SOUTH AUSTRALIA (INTERVENING)**

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**Part I: Certification**

1. This submission is in a form suitable for publication on the internet.

**Part II: Basis for Intervention**

2. The Attorney-General for the State of South Australia (“**South Australia**”) intervenes pursuant to s 78A of the *Judiciary Act 1903* in support of the appellant.

**Part III: Leave to Intervene**

3. Not applicable.

**Part IV: Submissions**

4. In summary, South Australia submits:

- 10 4.1. Sections 13(11) and 15 of the *Public Service Act 1999* (Cth) (“**PS Act**”) effectively burden the implied freedom, in that they impose qualified restrictions on the conduct of Australian Public Service (“**APS**”) employees in particular circumstances which include instances of communicative behaviour that might ultimately bear on electoral choice.
- 20 4.2. The purposes of ss 13(11) and 15 may be described, at the appropriate level of abstraction, as being to regulate the conduct of APS employees to enhance the effective functioning of the APS as an organisation of integrity and good reputation in furtherance of the structure of responsible government established by the *Constitution* and given content by the PS Act. Those purposes are manifestly compatible with the maintenance of the constitutionally prescribed system of government.
- 30 4.3. The nature of the burden is consistent across the APS though its scale and intensity varies. The burden operates by way of imposition of considered value judgments by an Agency Head, subject to legislative requirements of notice, due process and review by other statutory authorities, as to whether an APS employee has failed to behave in a way that upholds the APS Values and the integrity and good reputation of the APS and if not, what the sanction should be. The sections are suitable, necessary and adequate in their balance, being closely tailored to the purposes served, which are of fundamental public importance. In answer to the first question of law, the provisions are reasonably appropriate and adapted to advance the legitimate purposes articulated above at 4.2.
- 4.4. Alternatively, in answer to the second question of law, South Australia adopts the written submissions of the Attorney-General for the Commonwealth.

## Introduction

5. South Australia adopts the summary of facts from paragraphs [12] to [14] of the written submissions for the Attorney-General for the Commonwealth.
6. Section 13(11), as part of the APS Code of Conduct (“**the Code**”), provides 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.*” Section 15(1) confers a power to impose sanctions on an APS employee who is found to have breached the Code, including termination of employment: s 15(1)(a). To make such a finding and to impose a sanction requires undertaking an inquiry under the procedures established in s 15(3).
- 10 7. If, on their proper construction, ss 13(11) and 15 of the PS Act comply with the constitutional limitation on legislative power without any need to read them down to save their validity, any complaint about their application only raises a question of whether the repository of the power, being the Agency Head in the first instance and following that, any empowered reviewing authority, has complied with the statutory limits.<sup>1</sup>
8. Whether these provisions impermissibly infringe the implied freedom, or whether they comply with the constitutional limitation without needing to read them down, requires an exercise in construction that considers the operation and effect of the provisions, as well as their purpose.<sup>2</sup> If the purpose of the power residing in the combination of ss  
20 13(11) and 15 requires a restriction to be placed on political communications, the question of validity falls to be determined by the developed *Lange v Australian Broadcasting Corporation* (“**Lange**”) analysis.<sup>3</sup>

## Context

9. Understanding the operation, effect and purpose of the provisions is assisted by a number of contextual and textual observations. Parliament’s statement of the APS Values in s 10 is central to the operation of the PS Act. The Values reflect the need for an apolitical APS encompassing traditional notions of open accountability, impartiality, fairness and Ministerial responsibility to the Government, Parliament and Australian

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<sup>1</sup> *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>2</sup> *Brown v Tasmania* (2017) 261 CLR 328 at 353 [61], 373 [150] (Kiefel CJ, Bell and Keane JJ).

<sup>3</sup> (1997) 189 CLR 520; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 88 [215] (Crennan and Kiefel JJ).

public.<sup>4</sup> The PS Act then establishes a structure to facilitate aspects of responsible government reflected in the APS Values.

10. The APS consists of Agency Heads (the Secretary of a Department or the Head of an Executive or Statutory Agency)<sup>5</sup> and APS employees.<sup>6</sup> Under the responsible Minister, a Head of an Executive Agency is responsible for managing his or her respective agencies and is accountable to the Government, the Parliament and the public in the same way as the Secretary of a Department.<sup>7</sup> Agency Heads assist Ministers to provide factual information to Parliament in relation to the operation and administration of their agencies.<sup>8</sup>

10 11. Section 20 of the PS Act devolves to Agency Heads, on behalf of the Commonwealth, all the rights, duties and powers of an employer in respect of APS employees in their agency.<sup>9</sup> An Agency Minister has no power of direction in relation to an Agency Head's powers as an employer.<sup>10</sup> The Prime Minister may only issue general directions to Agency Heads regarding the management and leadership of APS employees.<sup>11</sup> This is congruous with the APS Values in that the APS ought to be free from political influence and should serve the elected government without regard to political persuasion.

20 12. Section 13, in establishing the Code, imposes specific obligations on APS employees operating within this structure. Agency Heads and statutory office holders are bound by the Code in the same way as are APS employees.<sup>12</sup> The rules contained in the Code attach to the conduct of the individual rather than to his or her position. In this way the rules regulate conduct across all departments, executive and statutory agencies regardless of the individual's role, the tasks performed or the conditions of engagement.

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<sup>4</sup> The PS Act, and in particular the Code and APS Values, have been amended since the respondent was terminated from her employment. Consistent with the Amended Notice of Appeal at Core Appeal Book (CAB) 84 the provisions referred to in these submissions are those applying as at 15 October 2012.

<sup>5</sup> PS Act, s 7. Agency has a correlative meaning: s 7.

<sup>6</sup> PS Act, s 9.

<sup>7</sup> PS Act, ss 57(1), 66(1) and (3).

<sup>8</sup> PS Act, ss 57(2), 66(2).

<sup>9</sup> These powers include conferring a discretion to determine remuneration and other terms and conditions of APS employment (s 24), suspension from employment (s 28), termination from employment (s 29) and movement between agencies (s 27).

<sup>10</sup> PS Act, s 19.

<sup>11</sup> PS Act, s 21(1).

<sup>12</sup> PS Act, s 14.

13. The Public Service Commissioner (“**the Commissioner**”) has a central role in procuring compliance with the Code and the APS Values. This role includes considering and reporting to the Public Service Minister on any matter relating to the APS (s 41(1)(d)), promoting the APS Values and Code (s 41(1)(e)) including by directions issued under s 11, and inquiring into alleged breaches of the Code by Agency Heads, including recommendations for sanctions (s 41(1)(f)). Review of APS actions taken by Agency Heads in respect of breaches (or alleged breaches) of the Code can be conducted by the Merits Protection Commissioner established by Part 6 of the PS Act.<sup>13</sup> At the request of the Public Service Minister, the Merits Protection  
10 Commissioner is to inquire into and report to the Minister on particular APS action.<sup>14</sup> Protections are afforded by s 16 to APS employees who report breaches (or alleged breaches) of the Code to the Commissioner, the Merits Protection Commissioner or an Agency Head.
14. An alleged breach of the Code by an Agency Head is investigated by the Commissioner who reports directly to the “appropriate authority”.<sup>15</sup> The appropriate authority will vary depending on the role of the Agency Head.<sup>16</sup> Section 15 then confers a discretion on Agency Heads to impose a range of sanctions on APS employees for breaches of the Code which is consistent with the devolution of employment powers to Agency Heads.

20 *Text*

15. Having regard to the above framework, six observations can be made about s 13(11) read in the immediate context of s 15.
16. First, s 13(11) frames tenets of behaviour for an APS employee. It is not closely prescriptive.
17. Second, the requirement in s 13(11) that an APS employee “*behave in a way*” that upholds APS Values is a lesser obligation than that imposed on Agency Heads by s 12 who must “*uphold and promote the APS Values*”. This is consistent with the framework of responsible government set out in paragraphs [9] to [14] above.

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<sup>13</sup> PS Act, s 33(3).

<sup>14</sup> PS Act, s 50(1)(c).

<sup>15</sup> PS Act, ss 41(1)(f) and 41(3).

<sup>16</sup> PS Act, ss 41(1)(f) and 41(3).

18. Third, s 13(11) is expressed to apply to an individual APS employee “*at all times*”, notwithstanding whether he or she is performing duties in the course of his or her employment.
19. Fourth, s 13(11) requires an APS employee to uphold the good reputation of the APS, not the elected government of the day. This is consistent with the requirement that the APS be apolitical, as set out in s 10(1)(a).
20. Fifth, the legal consequences for a breach of s 13(11) are contained in the range of sanctions in s 15.
21. Finally, by its reference to behaving “*in a way that upholds the APS Values and the integrity and good reputation of the APS*”, s 13(11) expressly links to the public character and culture of the authority to which APS employees are responsible and invokes the framework of responsible government to which the PS Act gives content. These terms create obligations of accountability that go beyond the ordinary employee-employer relationship.

**The first question: Does the law effectively burden freedom of political communication?**

22. The first *Lange* question requires an assessment of the legal and operational effect of ss 13(11) and 15 to determine whether, and if so how, the provisions impose an effective burden on the ability to “*receive and to disseminate information which might ultimately bear on electoral choice*”.<sup>17</sup> This requires a qualitative assessment of the character of the burden. The extent of the burden imposed is not relevant to this enquiry.<sup>18</sup>
23. Sections 13(11) and 15 restrict, in some circumstances, the way in which APS employees may conduct themselves in respect of government and political matters. The provisions are not targeted at political communication.<sup>19</sup> They impose a restriction on conduct including instances of communicative behaviour that might ultimately bear on electoral choice. It is foreseeable that this may operate as a restriction on the manner and content of political communications.

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<sup>17</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [180] (Gageler J); *Tajjour v New South Wales* (2014) 88 ALJR 860 at 894 [153] (Gageler J).

<sup>18</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 218 [83] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 88 ALJR 860 at 892 [145] citing *Unions NSW v New South Wales* (2013) 88 ALJR 227 at [40].

<sup>19</sup> *Coleman v Power* [2004] HCA 36; 220 CLR 1 at 49 [91] (McHugh J).

24. The present case is an incident of such a foreseeable restriction. The respondent's tweets expressed her own opinion of matters of a political character central to the agency within which she worked. The tweets were critical of the Minister, members of the Commonwealth Parliament, the Department's communications manager and the policies of the government. They were accessible by journalists, politicians and other employees of the Department. In consequence, a delegate exercised the power under s 15(1)(a) of the PS Act to terminate the respondent's employment.

**The second question: compatibility testing**

10 25. Central to the analysis required by the second *Lange* question is the identification of the purpose of the law. The identification of that purpose is to be arrived at by the ordinary processes of statutory construction with particular attention to the mischief or mischiefs to which the law is directed.<sup>20</sup>

26. Section 13(11) contributes to the achievement of three stated objects of the PS Act, in particular:<sup>21</sup>

26.1. *"to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public"*; and

26.2. *"to provide a legal framework for the effective and fair employment, management and leadership of APS employees"*; and

26.3. *"to establish rights and obligations of APS employees."*

20 27. The components of this legal framework are set out in paragraphs [9] to [14] above. The obligation in s 13(11) is, in part, expressly directed to upholding the APS Values and the *integrity* of the APS, as a demand on behaviour of APS employees. By its terms, s 13(11) connects the values enshrined by s 10 in the APS as an organisation to the behaviour of the individuals who comprise the administrative units of that organisation. The provisions speak both to the character of the APS and the performance of APS employees, warranting the conclusion that, expressed at the appropriate level of abstraction, it is a primary purpose of the provisions to regulate the behaviour of APS employees to enhance the effective functioning of the APS as an integral part of the system of responsible government pursued by the PS Act.

30 28. That reference to effective functioning is not limited to employees' competency in the course of their employment. It includes their capacity to operate within the structures of

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<sup>20</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [96] (Kiefel CJ, Bell and Keane JJ).

<sup>21</sup> PS Act, s 3(a), (b) and (d).

the APS in ways that advance the structure of responsible government pursued by the PS Act.<sup>22</sup>

29. The reference to integrity in s 13(11), importantly for the present case, and for the fact that the appellant's communications took the form of anonymous tweets, extends to ensuring actual integrity within the framework of responsible government and the open accountability demanded by that framework.<sup>23</sup> It is not limited to public perception.

30. The obligation in s 13(11) is also directed to upholding the *good reputation* of the APS, again as a demand on behaviour. One aspect of this reputational purpose lies in avoiding circumstances that give rise to a reasonable apprehension or suspicion on the part of a member of the public that the decisions of government are not impartial.<sup>24</sup> This recognises that it is also critical to the performance by the APS of its various functions that there be *public confidence* that APS employees are performing the roles assigned to them with integrity, in accordance with the APS Values, and again, that they are doing so in ways that advance the structure of responsible government pursued by the PS Act.

31. Section 15 is expressly directed to enforcing the obligations established by the Code. The purpose of the provision is disciplinary and promotes compliance with the Code. This adds a further dimension to the character and purpose of s 13(11). It ensures the mandatory, enforceable nature of those obligations of behaviour towards the APS Values and their furtherance of responsible government, and the integrity and good reputation of the APS.

32. The legislative objects of the PS Act set out in paragraph [26] above and the context in which s 13(11) exists demonstrate a clear intention to establish and maintain an apolitical public service that is transparently accountable, through a framework of Ministerial responsibility to the Government, the Parliament and the Australian public. That framework incorporates a structure of enforcement and is directed to establishing universal norms of behaviour within the APS and amongst Agency Heads, the functioning of which is ultimately accountable to Parliament and the Australian people.

33. The purposes of ss 13(11) and 15 are then described, at the appropriate level of abstraction, as being *to regulate conduct to enhance the effective functioning of the*

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<sup>22</sup> Compare, for example, *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 at [106] (Perram, Mortimer and Gleeson JJ).

<sup>23</sup> PS Act, s 10(1)(e).

<sup>24</sup> *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

*APS as an organisation of integrity and good reputation in furtherance of the structure of responsible government established by the Constitution and given content by the PS Act.*

34. Those purposes are manifestly compatible with the maintenance of the constitutionally prescribed system of government: they enhance the functioning of that system. As set out at paragraph [15] of the submissions for the Attorney-General for the Commonwealth, the “*irreducible minimum content*” of representative and responsible government<sup>25</sup> prescribed by the *Constitution* contemplates a role for the public service, and a public service regulated by Commonwealth legislation that “*otherwise provides*”  
10 for the appointment and removal of its officers.<sup>26</sup> In *Mulholland v Australian Electoral Commission*, Gleeson CJ observed that a “*notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament.*”<sup>27</sup> In particular, as to responsible government, his Honour noted the “*deliberate lack of specificity on the part of the framers of the Constitution concerning the functioning of the Executive.*”<sup>28</sup> In respect of the public service that functioning has historically been detailed by the PS Act.<sup>29</sup> The purposes of the impugned provisions are so central to the operation of the PS Act, and directly connected to the effective functioning of the system of responsible government pursued by that Act, that they can only enhance the  
20 system the freedom is designed to protect.

### **The third question: proportionality testing**

35. The third *Lange* question as modified in *Coleman v Power*<sup>30</sup> and restated in *Brown v Tasmania*,<sup>31</sup> assuming positive answers to questions one and two, asks, “*is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of government?*” In *McCloy v New South Wales*, the plurality identified that this question (as previously formulated) was to be answered by consideration of three identified stages of proportionality testing: suitability, necessity and adequacy of balance.<sup>32</sup>

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<sup>25</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6] (Gleeson CJ).

<sup>26</sup> *Constitution*, ss 64 and 67.

<sup>27</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6] (Gleeson CJ).

<sup>28</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 189 [9] (Gleeson CJ).

<sup>29</sup> See below from [57] to [72].

<sup>30</sup> (2004) 220 CLR 1.

<sup>31</sup> *Brown v Tasmania* (2017) 261 CLR 328 at 1112 [104] (Kiefel CJ, Bell and Keane JJ).

<sup>32</sup> *McCloy v New South Wales* (2015) 257 CLR 178, at 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

### **Suitability**

36. Sections 13(11) and 15 clearly have a rational connection to the legitimate purposes identified above, in that they are drafted in terms that necessarily advance those purposes.<sup>33</sup> The regulatory terms of s 13(11) are sufficiently broad to enable APS employees to regulate their own behaviour to ensure they behave in a way that upholds APS Values and the integrity and good reputation of the APS. The terms of s 15 enable Agency Heads to make the necessary value judgments in the exercise of their discretion to impose a sanction. The exposure to risk of sanction under s 15 strengthens the regulatory effect of s 13(11). In their focus on conduct the provisions fit together and into the structure of responsible government pursued by the PS Act. They are patently suitable.

### **Extent of the burden**

37. A proper understanding of the extent of the burden is relevant to the next two stages of proportionality testing: whether there is an obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom (necessity) and the resolution of the test of adequacy of balance.<sup>34</sup>

38. To this end, analysis of the extent of any burden is assisted by stepping out methodically its qualities. This is ultimately a question of “*the incremental effect of that law on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice.*”<sup>35</sup> The factual circumstances of the communication in a particular case may provide useful examples of the effect of the legislation on political communication more broadly.<sup>36</sup>

39. First, the burden imposed by ss 13(11) and 15 only applies to those individuals who have accepted a contract as an APS employee in a particular agency and, by doing so, have agreed to be bound by the Code. The burden is qualified: it is conditional on agreement to be bound by its strictures as a condition of employment. Once bound, the nature of the burden is consistent across the APS, though its scale and intensity will vary.

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<sup>33</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [80] (French CJ, Kiefel, Bell and Keane JJ).

<sup>34</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>35</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [188] (Gageler J).

<sup>36</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ).

40. The voluntary nature of the employment relationship does not mean that there is no burden at all. Once the employment relationship is established, the price of political communications that breach the prohibition is exposure to the risk, and perhaps reality, of termination or some lesser consequence.<sup>37</sup>
41. This conditional nature of the burden is symbiotic with the purposes served: it is the conduct of APS employees that is critical to enhancing the effective functioning of the APS as an organisation of integrity and good reputation within the structure of responsible government established by the PS Act.
42. Second, in any given case, whether an APS employee has failed to “*behave in a way that upholds the APS Values and the integrity and good reputation of the APS*” will require an exercise of judgment.<sup>38</sup> Each of the *content* and the *process* of that judgment informs the extent of the burden, in different ways.
43. As to **content**, the judgment in a given case will necessarily look to the terms of engagement of an APS employee by an Agency Head under s 22, and the attendant classification of the APS employees under s 23 of the PS Act. Across the APS, APS employees will:
- 43.1. be employed by different Agency Heads in agencies that discharge different public functions;
- 43.2. be employed at different levels of seniority and responsibility, and for different durations, within the structure of responsible government advanced by the PS Act; and
- 43.3. be associated, in their employment, with matters of differing qualities of political sensitivity.
44. Behaviour of an executive with a corresponding level of responsibility that could reasonably be taken to fail to uphold the APS Values, the integrity or the good reputation of the APS would have a broader scope than that of a junior employee who performs routine administrative tasks. Those with access to sensitive information and who are visible to journalists, other politicians and interested third parties have (having regard to the APS Values):

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<sup>37</sup> *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 at [105] (Perram, Mortimer and Gleeson JJ).

<sup>38</sup> *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 at [106] (Perram, Mortimer and Gleeson JJ).

- 44.1. greater accountability for their actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;<sup>39</sup>
- 44.2. greater responsibility to the Government in providing frank, honest, comprehensive, accurate and timely advice, and in implementing the Government's policies and programs;<sup>40</sup> and
- 44.3. greater responsibility for quality of leadership.<sup>41</sup>
45. The framework of responsible government pursued by the PS Act necessarily requires these higher levels of responsibility and accountability from more senior employees. The integrity of senior employees in discharging their responsibilities is on this account a statutory necessity. It follows that public confidence that responsible government is being discharged in accordance with the APS Values and with integrity, that is, the good reputation of the APS, rests more heavily on these senior employees.
46. The scale of the burden is different at the junior end. For a junior APS employee with routine administrative duties to make, in a public forum such as Twitter, a political communication critical of the policy being administered by his or her Agency would give less cause to doubt the integrity of the APS within the framework of responsible government than an identical publication of a senior employee directly responsible for implementing that policy.
47. That is not to say that a publication by a junior employee would not in any circumstance be capable of breaching s 13(11). A highly intemperate or vitriolic political communication directed in criticism of the Agency's actions may in all of the circumstances be assessed against s 13(11) differently from a mere statement of support for a different policy. The nature and content of the communication will constitute further variables, as would the duties of the employee.<sup>42</sup>
48. Whether a particular political communication in terms fails to meet the standard of behaviour required by s 13(11) will require an assessment of not only the variables of role and content identified above but also, for example, the forum. Publication on open social media, as occurred in this case, has a different scope than, for example, publication to a small, closed discussion group.

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<sup>39</sup> PS Act, s 10(1)(e).

<sup>40</sup> PS Act, s 10(1)(f).

<sup>41</sup> PS Act, s 10(1)(h).

<sup>42</sup> See, however, *Starr v Department of Human Services* [2016] FWC 1460 at [73] (Hatcher VP).

49. The question of breach is, therefore, highly contingent on judgment. In any given case, the necessary judgment will have regard to the role and seniority of the APS employee, and the content, forum and impact of the behaviour on the APS Values, the integrity and good reputation of the APS, in context and objectively assessed.

50. As to **process**, the processes by which the required judgment may be exercised inform the extent of the burden insofar as they assist in tailoring the judgment exercised to the purposes served by s 13(11). In *Brown*, the plurality emphasised that the practical operation of the *Workplaces (Protection from Protesters) Act 2014* in providing for protesters to be removed could depend on a reasonable, but mistaken belief of a police officer that a protester is situated within a business access area.<sup>43</sup> The vagueness of the defining terms combined with the fact that it fell to a police officer to make an instant, quantitative judgment about the existence of a statutory boundary in a particular place, made the operation and practical effect of the resultant burden disproportionate to the purpose served.<sup>44</sup>

51. In the present matter, the operation and practical effect of the burden effected by a judgment in the individual case operates under very different processes. First, s 11(1) provides that the Commissioner must issue directions in writing in relation to each of the APS Values. One purpose of these directions is to determine, where necessary, the scope or application of APS Values.<sup>45</sup> They are intended to give the APS Values form and content, and consequently the obligation under s 13(11). In this way the content of the burden is required to be made more transparent.

52. Second, s 15(3) requires an Agency Head to establish procedures for determining whether an APS employee in the Agency has breached the Code. These procedures must comply with basic procedural requirements set out in Commissioner's Directions and must have due regard to procedural fairness.<sup>46</sup> They may be different for different categories of APS employee.<sup>47</sup> An Agency Head is further required to take reasonable steps to ensure that every APS employee in the Agency has ready access to the documents that set out these procedures.<sup>48</sup>

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<sup>43</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [73] (Kiefel CJ, Bell and Keane JJ).

<sup>44</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [79], [118], [144], [150], [152] (Kiefel CJ, Bell and Keane JJ).

<sup>45</sup> PS Act, s 11(1)(b).

<sup>46</sup> PS Act, s 15(3)(a) and (b).

<sup>47</sup> PS Act, s 15(3)(c).

<sup>48</sup> PS Act, s 15(5).

53. The judgment of whether there has been a breach then occurs in accordance with the published procedures. The regulations may prescribe limitations on the power of an Agency Head to impose sanctions.<sup>49</sup>
54. Where a breach of s 13(11) is asserted and pursued, then pursuant to s 33, an APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her employment, other than where that action consists of the termination of the employment. For most sanctions under s 15, therefore, there is a right of review. That review may include in the first instance review by the Agency Head and the regulations must provide for referral to the Merits Protection Commissioner if an applicant is not satisfied with the outcome of an initial review.<sup>50</sup>
- 10 55. Where the sanction is termination, Part 3.2 of the *Fair Work Act 2009* (Cth) makes provision for redress for unfair dismissal, specifically where the dismissal was “*harsh, unjust or unreasonable*”.<sup>51</sup> Those statutory criteria permit inquiry into whether s 13(11) was breached at all.<sup>52</sup>
56. The judgments required to establish a breach of s 13(11) and to determine a sanction under s 15 are consequently surrounded by legislative prescriptions of notice, due process, and review. These legislated processes affect the extent of the burden by promoting the close tailoring of the judgment to be made in the individual case to the purposes of the provision.

20 **Importance of purpose**

57. To assess the importance of the identified purposes first requires transparently identifying the value judgments deployed to inform the importance of the purposes being served and minimising the risk of the Court sitting in judgment on a legislative decision “*without having access to all of the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature.*”<sup>53</sup>
58. So expressed, this challenge advises care in ascribing importance of purpose in circumstances where Parliament’s own ascription of the importance of an apparent

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<sup>49</sup> PS Act, s 15(2).

<sup>50</sup> PS Act, s 33(4)(c).

<sup>51</sup> *Fair Work Act 2009* (Cth), s 385.

<sup>52</sup> See, e.g., *Cooper v Australian Taxation Office* [2015] FWCFB 868 at [18], [22] and *Starr v Department of Human Services* [2016] FWC 1460 at [68]-[76].

<sup>53</sup> *Brown v Tasmania* (2017) 261 CLR 328 at [436] (Gordon J), citing *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473; *Leask v Commonwealth* (1996) 187 CLR 579 at 615-616.

purpose may be discerned from ordinary indicators of legislative intention. As Brennan CJ observed in *Levy v Victoria*,<sup>54</sup> “The courts acknowledge the law-maker’s power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.”

59. The first step is to discern the importance that Parliament has expressly or implicitly ascribed to that purpose. This may present expressly or implicitly in the indicators used to identify the purpose itself.<sup>55</sup> It may be apparent in terms from an expression of the objects of the Act. It is permissible to have regard to the Second Reading Speech and/or Explanatory Memorandum insofar as they are capable of contributing to an understanding of Parliament’s assessment of the importance of the purpose. To do so would not be to go beyond the bounds of common law<sup>56</sup> or statutory prescriptions<sup>57</sup> as to the use that may be made of extrinsic materials, as what is in question is not the interpretation of a provision of an Act, but an assessment of the value judgments made as to the importance of the purpose served.
60. None of this is a matter of deference to Parliament’s assessment.<sup>58</sup> The exercise is a factual inquiry. But where Parliament has identified its view of the importance of an articulated purpose, that view, being by definition a representative opinion, is to be given significant weight in the Court’s assessment.
61. In addition, evidence of importance – necessarily public importance – of the identified purposes may be evidenced by a history of legislative regulation. In some cases the significance of the purpose served, that is, of the public interest, will be self-evident.
62. As identified above, the purposes served by the impugned provisions may be described as *to regulate conduct to enhance the effective functioning of the APS as an organisation of integrity and good reputation in furtherance of the structure of responsible government established by the Constitution and given content by the PS Act*. The importance of these purposes are reinforced by Parliament in the statement of objects in s 3(a) and (b) of the PS Act.

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<sup>54</sup> (1997) 189 CLR 579 at 598 (Brennan CJ).

<sup>55</sup> *Brown v Tasmania* (2017) 261 CLR 328 at 1128 [209] (Gageler J).

<sup>56</sup> *Owen v South Australia* (1996) 66 SASR 251 at 255-256 (Cox J).

<sup>57</sup> *Interpretation of Legislation Act 1984* (Vic), s 35 (b); *Acts Interpretation Act 1901* (Cth), s 15AB.

<sup>58</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at [90]-[91] (French CJ, Kiefel, Bell and Keane JJ).

63. The PS Act is the latest Commonwealth Act governing public service employment arrangements.<sup>59</sup> The Explanatory Memorandum notes the paper prepared by the Public Service and Merit Protection Commission and the then Department of Workplace Relations and Small Business, entitled *Accountability in a Devolved Management Framework*, which highlighted a number of perceived deficiencies which were intended to be remedied (at [11]):

10           “the new Act will recognise the distinctive ethos of Australia’s public administration and Parliament’s expectations of the public service. The 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.”

64. The Second Reading Speech then emphasised Parliament’s ascription of importance to remedying these deficiencies:<sup>60</sup>

20           “*In essence, the Bill recognises the distinctive character of public administration in a way that is absent from the current legislation and aims to put in place a framework for a high performance public service. The Bill does not prescribe process but, instead, ensures that Agency Heads are held accountable for their actions.*”

65. The APS Values and Code were critical components of the regulations made under the predecessor Act.<sup>61</sup> To note the deficiencies in the predecessor Act is not to say that the purposes served by the APS Values and the Code in the framework prescribed by the PS Act are new or novel. Rather, the Second Reading Speech makes clear that in 1999 the Commonwealth Parliament made an assessment of the perceived need to elevate the integrity and good reputation of the APS as part of the responsible government structure being reformed by the PS Act. Accordingly the APS Values and Code have been taken from the earlier *Public Service Regulations 1935* and made the centre of the responsible government framework pursued by the PS Act.

30 66. The importance of the integrity and good reputation of responsible government structures is, in any event, manifest. In *Nationwide News Pty Ltd v Wills*,<sup>62</sup> Deane and Toohey JJ described the doctrine of responsible government as:<sup>63</sup>

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<sup>59</sup> *Public Service Act 1902* (Cth); *Public Service Act 1922* (Cth).

<sup>60</sup> Senate, *Second Reading of the Public Service Bill*, Thursday 14 October 1999, p 9680.

<sup>61</sup> See, for example, the *Public Service Regulations 1935*, as amended from 25 March 1998.

<sup>62</sup> (1992) 177 CLR 1.

<sup>63</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71, fn 25 (Deane and Toohey JJ).

“a fourth main general doctrine underlying the Constitution as a whole. Alternatively, it can be seen as a system of government devised to permit observance of the doctrine of representative government in a constitutional monarchy in which executive powers are formally vested in a non-elected Sovereign.”

67. The strength of this general underlying doctrine was confirmed by this Court in *Williams v The Commonwealth*, in the context of Parliament’s control of the use of public moneys by the executive.<sup>64</sup>

68. The importance of a public service of integrity and good reputation in contributing to responsible government has long been recognised. As Finn J observed in *McManus v Scott-Charlton*:<sup>65</sup>

“The matter of emphasis, though, is that public service legislation served – and serves – public and constitutional purposes as well as bare employment ones. This is not at all surprising given (i) that such legislation provides for the marshalling of the 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: *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191; and (ii) the distinctive position as public officers that public servants in consequence occupy (though not invariably: cf *Ex parte Kearney* [1917] NSWStRep 68; (1917) 17 SR(NSW) 578) in our governmental order.”

69. Thus, for reasons “of governmental and public interest”, the objects of Australian public service legislation have long included “securing values proper to be required of a public service in our system of government and, in particular, the maintenance of public confidence in the integrity of the public service and of public servants.”<sup>66</sup>

70. The recognised importance of the integrity of the public service extended to reputation, and necessarily included integrity *per se*. In *Hot Holdings v Creasy*,<sup>67</sup> Kirby J traced the history of the development of recognition of the need for public service codes of conduct, starting with nineteenth century reforms that developed a public service culture of “personal integrity and financial probity.”<sup>68</sup> In any event, Parliament’s

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<sup>64</sup> *Williams v The Commonwealth* (2012) 248 CLR 156 at [60] (French CJ), [136] (Gummow and Bell JJ), [219] (Hayne J), [508]-[509], [515]-[516], [544] (Crennan J), [578]-[581] (Kiefel J).

<sup>65</sup> [1996] FCA 1820 at [34] (Finn J).

<sup>66</sup> *McManus v Scott-Charlton* [1996] FCA 1820 at [36] (Finn J).

<sup>67</sup> (2002) 210 CLR 438.

<sup>68</sup> *Hot Holdings v Creasy* (2002) 210 CLR 438 at 465 [88] (Kirby J), citing Holdsworth, *A History of English Law* (1938), vol 10, pp 509-514.

maintenance of the integrity of the executive has been expressly recognised as critical to responsible government.<sup>69</sup>

71. This necessity of securing values in the public service, as matters of both integrity and reputation in the pursuit of responsible government, has long been understood to require not the prohibition of all communication on political and governmental matters in a private capacity, but some restriction to the extent that this would be inconsistent with this purpose. The first Civil Service Regulations in South Australia, published in 1861, provided:<sup>70</sup>

10       *“The following Regulations have been adopted by Government for the guidance of all Officers and others in the Civil Service, and are published for general information:-*

*“1. Public Officers are required to abstain from all active interference in political movements.*

*“2. It is **desirable** that they should absent themselves from all public meetings convened for the discussion of political measures, as they will be held strictly responsible if at such meetings, or otherwise, they make any unauthorised statements, or adopt any course which may prove embarrassing to the action of the Government.*

20       *“3. They are to refrain from communicating to the newspaper press any information of which they may be in possession by virtue of their office, unless previously authorized to do so.*

*“4. Any officer or person in the pay of the Government violating the above regulations will render himself liable to dismissal from the Civil Service.*

*“Nothing, however, in the above regulations is to be considered as in any way interfering with the right of Public Officers to exercise their electoral franchise.”*

30       72. Regulations 21 and 23 of the *Regulations for the Civil Service of Victoria 1866* were to comparable effect. The necessary reach of prohibitions intended to discharge the identified purposes of the impugned provisions, being of fundamental public and constitutional importance, has long been recognised as extending to some political communications.

### **Necessity**

73. The question of whether there is another, equally effective, means of achieving an identified purpose which has a less restrictive effect on the burden and which is obvious and compelling, directs attention to those elements of the burden that are

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<sup>69</sup> *Horne v Barber* (1920) 27 CLR 494 at (Knox CJ and Gavan Duffy J), 500 (Isaacs J), 501 (Rich J); *Egan v Willis* (1998) 195 CLR 424 at [42] (Gaudron, Gummow and Hayne JJ); *McCloy v New South Wales* (2015) 257 CLR 178 at [168]-[171] (Gageler J).

<sup>70</sup> *The South Australian Government Gazette*, December 5, 1861, p 1024 (original emphasis).

constituted by the judgment required in the individual case and the processes by which the judgment is made. Simply to posit a law that excluded from the prohibition all or even just anonymous political communications, with no room for a judgment as to the effect of such a communication on the integrity or good reputation of the APS as part of the structure of responsible government, would fail to pursue Parliament's legitimate purposes to a comparable extent as the impugned scheme.<sup>71</sup>

74. The burden effected by the extent of the discretion in s 15 is inherently connected to the purposes served by s 13(11).<sup>72</sup> The section seeks to protect the integrity and good reputation of a critical element of the system of responsible government, the APS. As  
10 the Full Federal Court observed in *Chief of Defence Force v Gaynor*,<sup>73</sup> it is difficult to see how this could be effected other than through the conferring of a relatively broad discretion.

75. Further, the judgment is subject to prescriptions of notice, due process and opportunities for review.<sup>74</sup> Determinations under ss 13(11) and 15 occur within a heavily checked merits process. Different processes to calibrate the final judgment could presumably be envisaged, but the existence of another, equally effective process which would be more closely tailored to the purposes served and which is obvious and compelling, is not readily apparent.

#### **Adequacy of balance**

20 76. The same observations become key considerations in the third limb of proportionality testing. When it comes to weighing the “*incommensurables*” of extent of burden and importance of purpose, the critical elements of the extent of the burden are the content and processes of the required judgment. That judgment as to whether some impugned behaviour has breached s 13(11) is, in its essence, a judgment as to whether the very purposes that s 13(11) is designed to protect, have been undermined.

77. By imposing requirements of judgment, allowing the full range of relevant considerations to inform that judgment, and then attaching to that judgment requirements of notice, due process and opportunities for review, the PS Act steps back from imposing a burden that is not reasonably appropriate and adapted to advance the  
30 legitimate purposes of the law. These incidents of the judgment required in the

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<sup>71</sup> See *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J); *Tajjour v New South Wales* (2014) 254 CLR 508 at 888 [114] (Crennan, Kiefel and Bell JJ).

<sup>72</sup> *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [208] (Crennan and Kiefel JJ).

<sup>73</sup> *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 at [106] (Perram, Mortimer and Gleeson JJ).

<sup>74</sup> *A-G (SA) v Adelaide City Corporation* (2013) 149 CLR 1 at [213] (Crennan and Kiefel JJ).

particular case operate to ensure that the burden imposed is reasonably appropriate and adapted to the legitimate purposes, *by ensuring that the judgments of breach and sanction in the particular case are tied closely and transparently to the purpose of the prohibition*. By this means, the burden is well-tailored to the purposes to which ss 13(11) and 15 are directed.

### Conclusion

78. The burden operates by way imposition of considered value judgments as to whether the employee behaved in a way that upholds the APS Values and the integrity and good reputation of the APS. Speaking privately, or in the course of an unofficial activity, might in the circumstances be judged to amount to a breach of s 13(11), but not necessarily.

79. Similarly, whether the fact that tweets were sent anonymously meant that s 13(11) was not breached is a matter of judgment in the particular case. The Tribunal's reasoning that "[a] comment made anonymously cannot rationally be used to draw conclusions about the professionalism or impartiality of the public service"<sup>75</sup> is in error. It relies on the prohibition, and its purpose, being limited to matters of reputation and even then, from an artificial and incomplete perspective of reputation. Integrity in the structure of responsible government has an absolute quality: it requires that there will be some circumstances in which some employees, especially senior ones, may be judged accountable for their behaviour, whether they intended anonymity or not.

80. The requirement in s 13(11) of behaving in a way that upholds the APS Values *at all times* is similarly unremarkable. The Tribunal has failed to recognise<sup>76</sup> that the content of the obligation, including whether in a given case an activity undertaken outside of work hours would breach the requirement, *given* that it occurred outside of work hours, remains a matter of judgment in all of the circumstances.

81. By this device of aligning the content and processes of the required judgments with the fundamental purposes they serve, the provisions restrict communication on governmental or political matters no more than is reasonably necessary to achieve that protection.<sup>77</sup> It is not necessary to read down the statute to save its validity, nor to proceed to the second question of law. The burden imposed upon the implied freedom

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<sup>75</sup> Reasons for Decision [116], CAB 60.

<sup>76</sup> Reasons for Decision [125], CAB 63.

<sup>77</sup> *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLR 181 at 200 [40] citing *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 at 143.

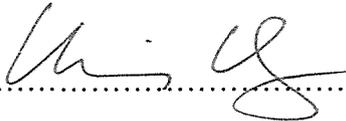
is tailored to the purpose, operating through the necessary mechanism of a considered judgment of all of the circumstances, which judgment is itself subject to transparent requirements of notice, due process and opportunities for review. The burden on the implied freedom is justified.

**Part V:**

82. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

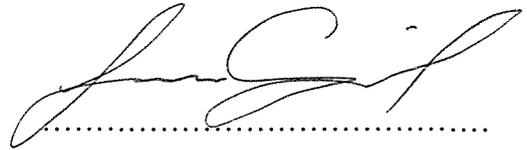
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