

**IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY**

No. C12 of 2018

BETWEEN:

**COMCARE
Appellant**

and

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**MICHAELA BANERJI
Respondent**

**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

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Part I: Certification:

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

Part II: Outline of Propositions:

Discerning Purpose

2. Sections 13(11) and 15 are critical regulatory components of the *Public Service Act 1999* (Cth). The framework established by the PS Act is directed to the performance culture of the Australian Public Service (APS) giving content to the doctrine of responsible government underlying the *Constitution* (Written Submissions (WS) at [9]-
10 [14]).
3. The express statements of purpose in the questions of law cannot confine the role of the Court in discerning legislative purpose (Core Appeal Book, p 84, WS, [4.2]). The question of validity of s 13(11) is not referable solely to the APS Value in s 10(1)(a) that the APS is apolitical, performing its functions in an impartial and professional manner: *Unions NSW (No.2)* at [79]; [171].
4. Section 13(11) contributes to three stated objects in the PS Act, being those in ss 3(a), (b) and (d), and the APS Values, particularly those in ss 10(1)(a) and (e). It speaks both to the character of the APS and the performance of APS employees, connecting the APS Values to the behaviour of the individuals who comprise the organisation.
- 20 5. In addition, s 13(11) speaks to the integrity and good reputation of the APS, again as demands on behaviour. Integrity is fundamental to the internal character and functioning of the organisation in its advancement of responsible government; reputation is concerned with public perception (*Gaynor* at [106], WS [29]). The values promoted by the provision are both “inward facing” and “outward facing” (cf. RS [21]) and so not limited to perceptions or reputation of professionalism and impartiality (cf. RS [26]).
- 30 6. 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. (WS [33])
7. 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 system the freedom is designed to protect. (WS [34])

Extent of the Burden

8. Whether an employee has breached s 13(11) requires a series of considered value judgments as to whether the employee behaved in a way that upholds APS Values and the integrity and good reputation of the APS. That is not to say that APS employees are forbidden from public political criticism. The obligation in s 13(11) may be contrasted with that on Agency Heads in s 12 (WS [17]).
9. Each of the content (i.e., the relevant considerations in making that judgment) and the process (i.e., the procedure for making that judgment and the statutory limits upon that judgment) informs the extent of the burden. (WS [42]-[49])
10. As to content, the role of the APS employee within the APS, and the functions that their role entails, are critical to an assessment of the extent of the burden in a particular case. The framework of responsible government pursued by the PS Act necessarily requires higher levels of responsibility and accountability from more senior employees. In this way, attention is focused on the terms of engagement of the APS employee by an Agency Head under s 22 and their attendant classification under s 23.
11. As to process, the judgments required to establish a breach of s 13(11) are surrounded by legislative prescriptions of notice, due process and review; compare the impact of process in *Brown v Tasmania* at [69], [118], [144], [150], [152] (JB 3, tab 21); (WS [50]-[56]).

Importance of Purpose

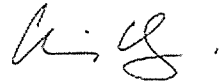
12. The Second Reading Speech in the Senate and Explanatory Memorandum (JB 9, tab 49, p 3764) make it clear that in 1999 the Commonwealth Parliament considered it necessary to elevate the integrity and good reputation of the APS as part of the responsible government structure being reformed by the PS Act. (WS [63]-[65])
13. The principle of responsible government intimately connects Responsible Ministers to Parliamentary Government and Party Government such that the actual government of the State is conducted by officers who enjoy the confidence of the people: *McCloy v New South Wales* (JB 5, tab 30, p 2124-2125); WS at [67]).
14. Public Service legislation has long been understood to facilitate government carrying into effect its constitutional obligation to act in the public interest. An object of this is to maintain the confidence of the people by securing values proper to be required of the

public service: *McManus v Scott-Charlton* at 24-25 (JB 5, tab 31, p 2208-2209) (WS [68]-[69]). To this end, regulation of the behaviour of the individuals that comprise that service has historically extended beyond the contractual employment relationship to regulation of private conduct (cf. RS [26]).

The Burden is Justified

15. Simply to posit a law that excluded from the prohibition all or even just anonymous political communications, with no room for 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. Intended anonymity of a communication might be relevant to the judgment in a particular case, but being a matter of the communicator's intention it cannot overcome the absolute character of the requirement of integrity. (WS [73])
16. The burden is well tailored to the purposes to which s 13(11) and 15 are directed. (WS [76]-[77])

Dated: 20 March 2019



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CD Bleby SC
Solicitor-General for
the State of South Australia