IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C12 of 2018

BETWEEN

COMCARE
Appellant

AND

MICHAELA BANERJI
Respondent

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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I INTERNET PUBLICATION

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

II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. ***Factual context:*** Between January and July 2012, Ms Banerji, an APS 6-level employee of the Department, tweeted using the handle "LaLegale": **CAB 7 [3](3), 12 [8]**. Her tweets concerned topics including offshore processing and Australia's obligations under the Refugees Convention: **CAB 13 [9]**. She assiduously avoided tweeting during work, and did so only once by retweeting a comment critical of her employer: **CAB 19 [26], 20 [30]**. Her tweets disclosed no confidential information: **CAB 8 [3](13)**. She revealed neither her name nor her status as an APS employee whether directly or indirectly: **CAB 12 [8]-[9]; Comcare BFM 57-76**. Whilst Mr Logan "suspected" that she was LaLegale, he sought an internal investigation to determine whether that was so: **Comcare BFM at 17**. It was the Department's subsequent investigation that identified her by examining personal material on her desk and cross-checking Facebook information with internal records: **CAB 54 [93]-[94], 60 [114], [116], Comcare BFM 47 [4], 49 [19]-[22].**

3. ***Construction of ss 10(1)(a) and 13(11):*** Rather than a broad and literal meaning (cf **CAB 45 [69], 63 [123]-[125]**), the Commonwealth advances a contextual meaning (**Cth [22]-[23]**) that it contends requires a nexus between the impugned behaviour and the effect it has on the public service (**T2229-2230**). The examples at **Cth [23]**, the fact of the application of those provisions to Ms Banerji's conduct, and the fact that the Commonwealth does not regard the identifiability of a public servant as an important factor in its contextual analysis (see **AHRC [41]**), show that the connection for which it contends is a very broad and attenuated one. Communicative conduct that leads to *a risk or chance of an effect on* the APS as an institution (**T2847-2850**), without more and without analysis of the directness of the connection between the conduct and that risk, thereby fails to uphold APS Values and the APS's integrity and good reputation.

4. ***Invalidity of s 10(1)(a) read with s 13(11):*** Sections 10(1)(a) and 13(11) **burden** the implied freedom by requiring APS employees to abstain from communication on governmental or political matters or breach the Code of Conduct and be placed in jeopardy of sanction. This burden is independent of and separate from actual disciplinary action under s 15.

5. The purpose of those provisions, as captured in s 3(a) of the PSA, is the APS's provision of services in an apolitical manner. That purpose should be understood by reference to the legislative history. See **RS [34]-[38]** and **AHRC [38]-[40].**

6. The provisions operate more widely than any legitimate interest in the APS's provision of services in an apolitical manner requires, and the provisions are not **rationally connected** to that purpose. That purpose is not rationally advanced by a law applying to *all* communicative conduct of public servants *including* communications that cannot, in their immediate context, be attributed to an APS employee: see **CAB 60 [116]**. The connection between the communicative conduct and any actual or perceived impact on the APS is too remote. And a provision of that breadth is **unnecessary to achieve** that purpose. See *Brown* at [109], [140] (**V3:T365**).

7. The provisions are also **inadequate in balance**, having regard to: **(a)** their broad operation and practical effect; **(b)** their tendency to discriminate, as they are unlikely to be applied to communications supporting government policy: *Brown* at [192]-[193], [199] (**V3:T21**); **(c)** their disparate impact on a particular class of persons: *Lange* at 571 (**V5:T29**); *Unions No 1* at [26]-[30], [137], [140], [145], [147] (**V6:T39**); *Unions No 2* (2019) 93 ALJR 166 at [14], [40], [137], [181]; *Brown* at [95], [202] (**V3:T21**); and **(d)** the importance of communication by APS employees: *Mulholland* (2004) 220 CLR 1 at [94]; *Lange* at 561 (**V5:T29**); **RS fn40**; **AHRC [27]-[29]**. **Cth [16]** wrongly assumes that a burden imposed on the political speech of public servants *necessarily* promotes the functioning of the constitutional system of government and may more readily be justified under the *Lange/ McCloy* analysis. That is not a fair assumption, especially given the systemic importance of political discussion by the public service.

8. ***Invalidity of the s 15(1) termination decision:*** If ss 10(1)(a) and 13(11) validly applied to her communicative conduct, then Ms Banerji impugns the validity of the termination decision in the following way.

9. Contrary to **Cth [44]-[45]**: absent application of the *Miller* principle (see [10] below), it cannot be said that *all* potential operations of s 15(1) will *necessarily* comply with the implied freedom. The language conferring the discretionary power ("An Agency Head *may* impose the following sanctions …", emphasis added) is very broad. The "proportionality" between sanction and breach that the Commonwealth seeks to imply into the power (**Cth [45]**) need not have any relationship with the implied freedom at

all: an assessment of severity may well hinge entirely on other factors, such as the employee's seniority, the wide public reception of the communication, or even whether the communication is "combative or vitriolic": **Cth [22]**. See, eg, *Tajjour* at [157]. Nor does the availability of review alter this analysis (cf **Cth [41], [45]**).

10. In such circumstances, this Court has said that it is necessary to apply the constructional principle articulated by Brennan J in *Miller* at 612-614. The grant of the broad discretionary power in s 15(1) must be construed as confining the exercise of the discretion within the limits of the implied freedom: *Wotton* at [9]-[10], [23] (**V8:T43**); **RS [43]; Cth [48]**. The parties then agree that determining whether s 15(1) authorises a given exercise of discretion requires at least some level of application of the *Lange/ McCloy* analysis: **RS [43]; Cth [50]-[51]**. However, the Commonwealth is wrong to contend that the analysis narrows to one of adequacy of balance: **Cth [6], [52]-[56]**. At the least, necessity testing is also relevant. There is no warrant for assuming that an individual exercise of power under s 15(1) could not have been exercised in an alternative way less restrictive of the freedom; see **AHRC [57]**.

11. The decision to terminate Ms Banerji's employment was inconsistent with the implied freedom because: (a) **other alternatives, less burdensome of the freedom, were reasonably available**, given that s 15(1) provides for lesser sanctions: **Comcare BFM 183, 217, 256, 273-274**; and (b) the termination was **grossly disproportionate** to any legitimate end, having regard to Ms Banerji's low level within the APS, the lack of connection between her tweets and the APS in their immediate context, the slight or non-existent potential for communications of that nature to undermine the APS's actual and perceived integrity and apolitical character (see **CAB 60 [116]**), and the seriousness of the sanction.

12. Although the Commonwealth contends that the *Lange/ McCloy* steps are not mandatory relevant considerations for a decision-maker under s 15(1) (**Cth [57]**), "describing the implied freedom as a relevant consideration (as Kiefel J did in *Wotton*) is one way of characterising the nature of the excess of power, although not the only way": *Gaynor* at [80] (**V4:T22**); *Wotton* at [31]-[32], [88] (**V8:T43**). The delegate did not consider the freedom (there being no reference to it in the reasons even though Ms Banerji relied upon it: **Comcare BFM 265 [11]**).

Dated: 21 March 2019

Ron Merkel, Christopher Tran and Celia Winnett