

Sexton

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C12 of 2018

BETWEEN

COMCARE

Appellant

AND

MICHAELA BANERJI

Respondent

OUTLINE OF ORAL ARGUMENT OF ATTORNEY GENERAL FOR NSW

10 **PART I PUBLICATION**

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

PART II PROPOSITIONS

Section 15 of the Public Service Act 1999 (Cth)

2. Sanctions imposed under s 15 of the Public Service Act 1999 (Cth) ("PSA") for breaches of the APS Code of Conduct must be reasonably proportionate to the breach in question.
3. The procedure for determining whether there has been a breach must involve "due regard to procedural fairness": PSA, s 15(3).
4. Any sanction imposed is also reviewable: see PSA Act, s 33; Fair Work Act 2009 (Cth), Pts 3-1, 3-2.

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James Lonsdale, Acting Crown Solicitor
Crown Solicitor's Office
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000

Tel: (02) 9224 5088
Fax: (02) 9224 5222
Email: Christopher.Frommer@cso.nsw.gov.au
Ref: Chris Frommer

Sections 10 and 13 of the PSA

5. In some circumstances, ss 10 and 13 of the PSA will operate to impose a limit on political communication. The burden on the implied freedom that arises in such circumstances is insubstantial and incidental to the regulation of the APS.
6. Maintaining an apolitical public service, which holds the public's confidence, is a legitimate and important end in the context of the constitutionally prescribed system of representative and responsible government.
7. The requirement in ss 10 and 13 of the PSA that APS employees uphold the values of the APS as an apolitical body, which performs its functions in an impartial and professional manner, is reasonably appropriate and adapted to the goal of maintaining the apolitical nature of the APS.
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8. If an APS employee, in fact, behaves in such a way as to not uphold the values of the APS as an apolitical body, a finding that there has been a breach of s 13(11), and the imposition of a proportionate sanction under s 15, would not impermissibly burden the constitutionally implied freedom of political communication: see Wotton v Queensland (2012) 246 CLR 1 at [23]-[24], [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The merits of a decision by an Agency Head that an APS employee has behaved in such a way are reviewable pursuant to s 33 of the PSA, and a decision made divorced from the purposes of the PSA would not be a decision authorised by the PSA.
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9. The express and implicit limits on the power to find a breach of the APS Code of Conduct, and to impose a concomitant sanction, are sufficient to ensure that a particular decision will not impose an unjustified or impermissible burden upon the implied freedom of political communication.

Date: 20 March 2019



M G Sexton SC SG



Frances Gordon