

IN THE HIGH COURT OF AUSTRALIA  
CANBERRA REGISTRY

No. C12 of 2018

BETWEEN:

COMCARE  
Appellant

AND

MICHAELA BANERJI  
Respondent



ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY  
GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

20

**PART I: SUITABILITY FOR PUBLICATION**

---

1. These submissions are in a form suitable for publication on the Internet.

**PART II: BASIS OF INTERVENTION**

---

2. The Attorney General for Western Australia intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

**PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED**

---

3. Not applicable.

---

Date of Document: 14 November 2018

Filed on behalf of the Attorney General for Western Australia by:

State Solicitor for Western Australia  
David Malcolm Justice Centre  
28 Barrack Street  
PERTH WA 6000  
Solicitor for the Attorney General for Western Australia

Tel: (08) 9264 1888  
Fax: (08) 9321 1385  
Ref: Jennifer Perera  
Email: j.perera@sg.wa.gov.au

**PART IV: SUBMISSIONS**

---

4. The State of WA makes submissions on Question 1, adopts the Commonwealth's submissions on Question 2, and makes no submissions on Question 3.<sup>1</sup>
5. In relation to Question 1, the State of WA submits:
- 10 (a) properly construed, as it stood at the relevant time in 2012, s.13(11) of the *Public Service Act 1999* (Cth) prescribed a normative standard of conduct for an Australian Public Service ("APS") employee which imposed a substantive limit upon the ability of the employee to promote or criticise the merits of the policy ideas, principles or commitments of elected representatives, or political parties, whether or not that promotion or criticism occurred while the APS employee was carrying out particular functions or duties as an APS employee;
- 20 (b) a law of that nature, which prescribed a normative standard of conduct, was for the legitimate purpose of maintaining the form of representative democracy which is adopted by the Commonwealth *Constitution*, which places responsibility for devising and executing policy matters in the hands of elected representatives, and not in the hands of unelected public servants;
- (c) the normative standard of conduct prescribed by s.13(11) was necessary, suitable and adequately balanced for achieving this legitimate objective; and
- (d) section 15 permitted a wide range of sanctions to be applied for any breach of the normative standard of conduct. This wide range of sanctions ensured that the available penalties were also necessary, suitable and adequately balanced for achieving this legitimate objective.

---

<sup>1</sup> Questions of law as set out in the Amended Notice of Appeal, CAB 84-87.

**The requirement that an APS employee behave at all times in a manner that is "apolitical"**

6. At the relevant time in 2012, s.13(11) of the *Public Service Act 1999* (Cth) provided that an APS employee must "at all times behave in a way that upholds ... the APS Values and APS Employment Principles; and ... the integrity and good reputation of the employee's Agency and the APS." Section 10(1)(a) and (g) provided that the APS Values included values that the APS is apolitical and performs its functions in an impartial and professional manner, and that the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.
7. The effect of these provisions was that an APS employee was required to behave in a manner that upheld the value that the APS was "apolitical". The Shorter Oxford English dictionary defines "apolitical" as meaning "Unconcerned with or detached from politics". It also relevantly defines "politics" as "The ideas, principles, or commitments of an individual, organization etc, in political life; the organizational process or principle according to which decisions are made affecting authority, status etc."
8. Section 13(11) must also be understood in the context of the form of representative democracy adopted by the *Commonwealth Constitution*. That form of democracy involves elected representatives acting as Ministers of State and being responsible for the administration of the departments of State (*Constitution*, s.64) which are responsible for the execution and maintenance of the *Constitution* and the laws of the Commonwealth (*Constitution*, s.61). The differentiation in responsibility between elected officials and public servants underlies why a public official is not qualified to serve in the Commonwealth Parliament (*Constitution*, s.44(iv)).
9. In these circumstances, the requirement in s.13(11) that an APS employee must behave in a manner which is "apolitical" should be construed to require an APS employee to behave at all times in a manner which is detached from (i.e. does not promote or criticise) the merits of the policy ideas, principles or

commitments of the elected representatives, or the parties of the elected representatives, whom the APS employee serves.

10. Consequently, the requirement that an APS employee behave in a manner which is "apolitical" will limit the ability of that employee to promote or criticise the merits of the policy ideas, principles or commitments of elected representatives, or political parties.
11. This limit is stated to apply "at all times". There is also a constructional question about whether this means "at all times" while the APS employee is carrying out functions or duties as an APS employee, or at all times, including on occasions when an APS employee is not carrying out functions or duties as an APS employee.
12. The requirement should be construed in the second way. That is because the words are emphatic in referring to "all times". As well, the subject matter of s.13(11) was concerned with the integrity and good reputation of the employee's agency and the APS. The integrity and reputation of the APS may well be affected by matters which occur even when the APS employee is not carrying out duties or functions as an APS employee, eg unconnected criminal activity.
13. It follows that s.13(11) should be construed so that it imposed a substantive limit upon the ability of an APS employee to promote or criticise the merits of the policy ideas, principles or commitments of elected representatives, or political parties, whether or not that promotion or criticism occurred while the APS employee was carrying out particular functions or duties as an APS employee.
14. It also follows that s.13(11) applied, whether the APS employee was acting anonymously or not. As explained, the application of s.13(11) did not depend upon whether the APS employee was carrying out the functions or duties of an employee of the APS. The reputation of the APS may well be affected if an APS employee acts anonymously, but the action is later linked back to the employee or the APS more generally. That has occurred here.

**Question 1: Constitutional Validity of s.13(11) and s.15 of the Public Service Act**

15. The constitutional validity of s.13(11) (as it stood in 2012) depends upon whether the Commonwealth or other Australian Parliament may pass a law which limits the ability of a public servant to promote or criticise the merits of the policy ideas, principles or commitments of elected representatives, or political parties, whether or not that promotion or criticism occurs while the public servant is carrying out particular functions or duties as a public servant; or whether such a law impermissibly infringes upon the implied freedom of political communication.
- 10 16. By definition, the type of law enacted by s.13(11) limits the ability of a person who is a public servant to promote or criticise policy decisions of the government which that person serves. In other words, the law effectively burdens the freedom. This is the first question in the analytical framework summarised in *McCloy v New South Wales*.<sup>2</sup>
17. The critical issues are whether this advances a purpose, and does so by means, which are compatible with the constitutionally prescribed form of government; and whether the limits which are imposed are reasonable, appropriate and adapted to achieve that objective. These are the second and third questions in *McCloy's* analytical framework
- 20 18. Section 15 imposes a range of sanctions for breaching s.13. If s.13(11) is not constitutionally valid, because it prescribes a normative standard which is not for a legitimate purpose or does not achieve that purpose by legitimate means, s.15 will not operate. On the other hand, if s.13(11) is consistent with the implied freedom, the range of sanctions available under s.15 may be relevant to assessing whether the operation of s.13(11) is reasonably appropriate and adapted to advance a legitimate object.

---

<sup>2</sup> (2015) 257 CLR 178 at 194 [2] (French CJ, Kiefel, Bell and Keane JJ), see also *Brown v Tasmania* (2017) 261 CLR 328 at 363 [104] (Kiefel CJ, Bell and Keane JJ), 376 [156] (Gageler J), [316]-[325] (Gordon J)

*Legitimate Purpose and Means*

19. It is a legitimate<sup>3</sup> purpose to ensure that an Australian public service is "apolitical" in the sense described previously. That derives from the form of representative democracy adopted by the *Constitution*, which makes the elected representatives of government accountable for policy decisions. It is not appropriate for the public servants who are responsible for implementing these policy decisions to be seen to have separate views that may conflict with the policy decisions of the elected representatives. The public would then correctly apprehend that the unelected representatives may endeavour to subvert the policy decisions made by the people who had been elected by the public. As well, elected Ministers may well lose confidence in the public service to faithfully implement policy decisions. In both cases, representative democracy is undermined.

*Reasonably Appropriate and Adapted*

20. The effect of s.13, read with s.10, was to prescribe a normative standard of conduct.<sup>4</sup> The prescription of a standard of conduct is, by itself, suitable, necessary and adequate as a statutory measure to ensure that a public service is apolitical. The critical issue is whether the sanctions for not complying with that standard, as prescribed by s.15, were also suitable, necessary and adequate.
21. The sanctions covered a range, from a reprimand to termination. Within that range, a variety of other measures could be applied, such as fines, salary reductions, re-assignment and a demotion. In other words, a very wide range of gradated sanctions were available. The application of those sanctions was a matter of discretion for the Agency Head.
22. The wide range of available sanctions means that the particular measure applied to a specific case may be decided proportionately by the Agency

---

<sup>3</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 248 [184] (Gageler J); *Brown* at 391 [207] (Gageler J).

<sup>4</sup> Cf. *Monis v The Queen* (2013) 249 CLR 92 at 196 [288] (Crennan, Kiefel and Bell JJ).

Head. The law itself therefore prescribed measures which could be applied which were suitable, necessary and adequate, as they could be adjusted for the circumstances of each case.<sup>5</sup>

23. The discretion to apply a disciplinary sanction according to the circumstances of a case will not itself be unconstitutional, unless some of the available sanctions could never be appropriate. If, as a matter of discretion, an inordinately harsh penalty is applied, that may be corrected through an appeal or review, not upon the basis that the legislation allowing the penalty to be applied in a particular case is unconstitutional.<sup>6</sup> That is because the legislation is validly enacted, but the application of the legislation in a particularly case has misfired. The implied political freedom is concerned with legislative power, not the facts of particular cases.<sup>7</sup>

### *Answer to Question 1*

24. Question 1 should be answered:

"Sections 13(11) and 15 of the *Public Service Act 1999* (Cth) (the impugned provisions), as at 15 October 2012, were reasonably appropriate and adapted to advance the legitimate objective of maintaining 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."

### **Question 2: Extent of Discretion**

25. The State of WA adopts the Commonwealth's submissions.

---

<sup>5</sup> Cf. *Wotton v Queensland* (2012) 246 CLR 1 at [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 34 [91] (Kiefel J).

<sup>6</sup> *Wotton v Queensland* (2012) 246 CLR 1 at 14 [24], 16 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>7</sup> *Attorney General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 89 [220] (Crennan and Kiefel JJ).

**Question 3: Validity of Tribunal's Decision**

26. The State of WA does not make submissions on this question.

**PART V: LENGTH OF ORAL ARGUMENT**

---

27. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

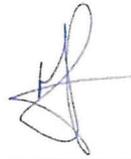
Dated: 14 November 2018

10



---

JA Thomson SC  
Solicitor-General for Western Australia  
Telephone: (08) 9264 1806  
Facsimile: (08) 9321 1385  
Email: j.thomson@sg.wa.gov.au



---

NTL John  
Assistant State Counsel  
Telephone: (08) 9264 1888  
Facsimile: (08) 9264 1670  
Email: nick.john@sso.wa.gov.au