HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

COMCARE APPELLANT

AND

MICHAELA BANERJI RESPONDENT

Comcare v Banerji
[2019] HCA 23
7 August 2019
C12/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the decision of the Administrative Appeals Tribunal made on 16 April 2018 and, in its place, order that the reviewable decision of 1 August 2014 be affirmed.*

3. *The respondent pay the appellant's costs of the appeal.*

Representation

B J Tronson for the appellant (instructed by Australian Government Solicitor)

R Merkel QC with C G Winnett and C J Tran for the respondent (instructed by Lander & Co)

S P Donaghue QC, Solicitor-General of the Commonwealth, and C L Lenehan with J D Watson for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with F I Gordon for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

C D Bleby SC, Solicitor-General for the State of South Australia, with L Gavranich for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

J A Thomson SC, Solicitor-General for the State of Western Australia, with N T L John for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

Australian Human Rights Commission appearing as amicus curiae, limited to its written submissions

CATCHWORDS

Comcare v Banerji

Constitutional law (Cth) – Implied freedom of communication on governmental and political matters – Where Australian Public Service ("APS") Code of Conduct ("Code") included requirement in s 13(11) of *Public Service Act 1999* (Cth) that employees behave in way that upholds APS Values and integrity and good reputation of APS – Where APS Values in s 10(1) of that Act included that APS is apolitical, performing functions in impartial and professional manner – Where Agency Head empowered by s 15(1) of that Act to impose sanctions on employee found to have breached Code, including termination of employment – Where employee of government Department published tweets critical of Department, its employees, policies and administration, Government and Opposition immigration policies, and members of Parliament – Where employment with Commonwealth terminated for breach of Code – Where employee claimed compensation under *Safety, Rehabilitation and Compensation Act 1988* (Cth) for "injury", defined to exclude injury suffered as result of reasonable administrative action taken in reasonable manner in respect of employee's employment – Whether ss 10(1), 13(11) and 15(1) of *Public Service Act* impose effective burden on implied freedom – Whether burden on implied freedom justified – Whether impugned provisions for legitimate purpose – Whether provisions suitable, necessary and adequate in balance.

Words and phrases – "adequate in its balance", "anonymous", "apolitical", "APS Code of Conduct", "effective burden", "impartial", "implied freedom of political communication", "integrity", "legitimate purpose", "necessary", "public servants", "public service", "reasonably appropriate and adapted", "suitable", "system of representative and responsible government", "tweets", "unjustified burden".

Fair Work Act 2009 (Cth), Pt 3.2.
Public Service Act 1999 (Cth), ss 10(1), 13(11), 15(1), 33(1).
Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 5A(1), 14.

1 KIEFEL CJ, BELL, KEANE AND NETTLE JJ. This is an appeal from a decision of the Administrative Appeals Tribunal ("the Tribunal") removed into this Court pursuant to s 40(1) of the *Judiciary Act 1903* (Cth) on the application of the Attorney-General of the Commonwealth (intervening). The question for decision is whether, as the Tribunal held[1], ss 10(1), 13(11) and 15(1) of the *Public Service Act 1999* (Cth) as at 15 October 2012 ("the impugned provisions") imposed an unjustified burden on the implied freedom of political communication, with the result that the termination of the respondent's employment with the Commonwealth for breaching the Australian Public Service ("APS") Code of Conduct was not reasonable administrative action taken in a reasonable manner with respect to her employment within the exclusion in s 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Compensation Act"). For the reasons which follow, the impugned provisions did not impose an unjustified burden on the implied freedom of political communication, and the termination of the respondent's employment with the Commonwealth was not unlawful.

The facts

2 The uncontroversial facts of the matter were as follows. On 10 April 2006, the respondent was offered and accepted employment as an ongoing APS 6 employee within the Ombudsman and Human Rights and Equal Opportunity Commission Section of what became the Department of Immigration and Citizenship ("the Department")[2]. She commenced work in that position on 29 May 2006[3]. At some time prior to 7 March 2012, she began broadcasting tweets on matters relevant to the Department, using the Twitter handle "@LaLegale"[4]. There were more than 9,000 such tweets, at least one of which was broadcast during the respondent's working hours[5], and many of which were variously critical of the Department, other employees of the Department, departmental policies and administration, Government and Opposition immigration policies, and Government and Opposition members of Parliament[6].

---

1 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [67], [119], [128].

2 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(3)].

3 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(4)].

4 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(13)].

5 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [26]-[27].

6 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [8], [40] fn 3.

The Tribunal found[7] that "*[s]ome* of the tweets are reasonably characterised as intemperate, even vituperative, in mounting personal attacks on government and opposition figures".

3 On 7 March 2012, the Workplace Relations and Conduct Section of the Department ("the WRCS") received a complaint from one of its employees, which was copied to the National Communications Manager, alleging that the respondent was inappropriately using social media in contravention of the APS Code of Conduct[8]. After reviewing the complaint, the Director, WRCS determined that the complaint did not contain sufficient material to proceed with a formal APS Code of Conduct investigation, and advised the complainant of his determination[9].

4 On 9 May 2012, the WRCS received a second, more detailed complaint regarding the respondent's conduct[10]. On the basis of that complaint, on or around 15 May 2012, the Director determined to initiate an investigation into whether the respondent's conduct gave rise to possible breaches of the APS Code of Conduct, and, on 23 July 2012, the WRCS informed the respondent of the Director's determination[11].

5 Between 15 May 2012 and 13 September 2012, the Assistant Director, WRCS conducted the investigation into whether the respondent's conduct gave rise to possible breaches of the APS Code of Conduct and prepared an investigation report dated 13 September 2012[12]. On 20 September 2012, the Director, Workforce Design and Strategy, being an authorised delegate of the Secretary of the Department, sent a letter to the respondent setting out a proposed determination of breach of the APS Code of Conduct and inviting the respondent to provide a response[13]. On the same day, the respondent sent an email to the

---

7 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [109] (emphasis added).

8 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(14)].

9 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(15)].

10 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(16)].

11 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(16)-(17)].

12 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(18)].

13 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(19)], [12].

WRCS responding to the proposed determination of breach[14]. On 15 October 2012, the delegate determined that the respondent had breached the APS Code of Conduct and proposed a sanction of termination of employment[15]. The respondent was provided with the determination and given seven days to provide a response[16].

6 On 19 October 2012, the Director, WRCS and the delegate met the respondent and her union representative at the respondent's request[17]. During that meeting, the respondent admitted to having broadcast tweets under the handle @LaLegale in which she criticised Government immigration policy and her direct departmental supervisor, and, on the same day, the respondent sent an email to the complainant offering an "unreserved" apology[18]. Thereafter, she sought and was granted a number of extensions of time in which to provide a response to the proposed determination of sanction[19]. The last extension granted was until 2 November 2012[20]. On 1 November 2012, the respondent instituted proceedings in the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia) seeking interim and final injunctions to restrain the Department from proceeding with the proposed sanction of termination of her employment[21].

7 On 2 November 2012, the respondent submitted a response to the proposed sanction of termination of employment[22]. On the same day, her representative, the Media, Entertainment and Arts Alliance, also submitted a written response to the proposed determination of sanction, and, on 9 November

---

14 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(20)].

15 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(21)].

16 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(21)].

17 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(22)].

18 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(22)-(23)].

19 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(24)].

20 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(24)].

21 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(25)].

22 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(26)].

2012, submitted a further response[23]. On 11 November 2012, the respondent submitted another response dated 9 November 2012[24]. On 17 November 2012, she sent an email to the Director, WRCS withdrawing her admission and apology and alleging that the process underlying the APS Code of Conduct investigation and termination decision was flawed[25].

8 On 9 August 2013, the Federal Circuit Court rejected the respondent's claim for interim injunction[26]. On 15 August 2013, the Director, WRCS wrote to the respondent setting out the steps which the Department proposed to take to finalise the process relating to the respondent's breaches of the APS Code of Conduct[27]. The letter stated that the delegate would consider all of the information provided by and on behalf of the respondent in response to the 15 October 2012 determination, that the delegate would then write to the respondent advising her of the proposed sanction (if any) and inviting her to make any further submissions she may wish to make concerning it, and that the delegate would thereafter complete the review process and make a final determination as to the sanction to be imposed. The letter also stated that any sanction would not be implemented until 14 days after the delegate had made the determination. On 26 August 2013, the delegate provided the respondent with a further opportunity to respond to the proposed sanction of termination in line with the process set out in the letter of 15 August 2013, and, on 30 August 2013, the respondent provided a further response[28]. On 12 September 2013, the delegate wrote to the respondent setting out the delegate's decision to impose a sanction of termination of employment under s 15 of the *Public Service Act*[29].

9 On 13 September 2013, the Director, WRCS (who at that time was acting as the Assistant Secretary, People Services and Systems Branch, and held a delegation under s 78(7) of the *Public Service Act* to exercise the power to make

---

23 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(27)-(28)].

24 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(29)].

25 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(30)].

26 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(31)].

27 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(32)-(33)].

28 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(33)-(34)].

29 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(35)].

decisions under s 29(1)) wrote to the respondent providing her with notice of termination of employment to take effect from close of business on 27 September 2013[30]. On 28 March 2014, the respondent entered into a Deed of Agreement with the Commonwealth of Australia represented by the Department to settle the proceedings in the Federal Circuit Court[31].

10 On 18 October 2013, the respondent lodged a claim for compensation under s 14 of the Compensation Act for an "injury" within the meaning of s 5A(1) of the Compensation Act, said to be comprised of an "adjustment disorder characterised by depression and anxiety" being an aggravation of an underlying psychological condition arising out of termination of the respondent's employment[32].

11 On 24 February 2014, a delegate of the appellant rejected the claim for compensation, and, on 1 August 2014, another delegate of the appellant affirmed that determination, on the basis that the termination of the respondent's employment was reasonable administrative action taken in a reasonable manner in respect of the respondent's employment, within the meaning of s 5A(1) of the Compensation Act, and, consequently, that such injury as the respondent may have suffered (if any) was not an "injury" within the meaning of that section[33].

Relevant statutory provisions

12 Section 14 of the Compensation Act provided, so far as is relevant, that the appellant is liable to pay compensation in accordance with the Compensation Act in respect of an "injury" suffered by an employee if the injury results in death, incapacity for work, or impairment.

13 Section 5A(1) of the Compensation Act defined "injury" as including, in substance, an aggravation of a mental injury that arose out of, or in the course of, employment, but as excluding any such aggravation as is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment.

---

30 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(36)].

31 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(37)].

32 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [2], [3(5)-(10)].

33 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [2], [3(12)].

14 Section 10 of the *Public Service Act* defined the APS Values, so far as is relevant, as follows:

> "(1) The APS Values are as follows:
>
> (a) the APS is apolitical, performing its functions in an impartial and professional manner;
>
> ...
>
> (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public".

15 Section 13 of the *Public Service Act* set out the APS Code of Conduct, so far as is relevant, as follows:

> "(1) An APS employee must behave honestly and with integrity in the course of APS employment.
>
> ...
>
> (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
>
> ...
>
> (11) 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."

16 Section 15 of the *Public Service Act* provided for the establishment of procedures for the determination of breach, in sub-s (3), and prescribed the sanctions available, subject to any limitations in the regulations, as follows:

> "(1) An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection (3)) to have breached the Code of Conduct:
>
> (a) termination of employment;
>
> (b) reduction in classification;

(c) re-assignment of duties;

(d) reduction in salary;

(e) deductions from salary, by way of fine;

(f) a reprimand."

Departmental and APS guidelines

17 Both the Public Service Commissioner and the Department promulgated guidelines to assist employees in complying with their obligations under the *Public Service Act*[34]. At relevant times, the departmental guidelines explained that "[p]ublic comment, in its broadest sense, includes comment made on political or social issues at public speaking engagements, during radio or television interviews, [and] on the internet", and cautioned that it was not appropriate for a Department employee to make unofficial public comment that is, or is perceived as, compromising the employee's ability to fulfil his or her duties professionally in an unbiased manner (particularly where comment is made about Department policy and programmes); so harsh or extreme in its criticism of the Government, a member of Parliament or other political party and their respective policies that it calls into question the employee's ability to work professionally, efficiently or impartially; so strongly critical of departmental administration that it could disrupt the workplace; or unreasonably or harshly critical of departmental stakeholders, their clients or staff[35]. Similar, more extensive guidance was provided in Australian Public Service Commission Circular 2012/1 ("the APS Guidelines"), which recorded that, "[a]s a rule of thumb, irrespective of the forum, anyone who posts material online should make an assumption that at some point their identity and the nature of their employment will be revealed"[36]. In turn, the tenor of the APS Guidelines was further reiterated for employees of the Department in a document entitled "'What is Public Comment?' Workplace Relations and Conduct Section Fact Sheet"[37].

---

34 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [35].

35 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [36].

36 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [37].

37 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [38].

The proceedings before the Tribunal

18 Before the Tribunal, the parties were agreed that the only issue for the Tribunal was:

> "whether or not the termination of the [respondent's] employment with the Commonwealth falls outside the exclusion in s 5A(1) of the Act, having regard to the implied freedom of political communication."[38]

19 It is unfortunate that the issue was framed in those terms for it appears to have led the Tribunal to approach the matter, wrongly, as if the implied freedom of political communication were a personal right like the freedom of expression guaranteed by ss 1 and 2(b) of the *Canadian Charter of Rights and Freedoms* or the freedom of speech guaranteed by the First Amendment to the *Constitution of the United States*. Thus, in their reasons for decision, the Tribunal spoke[39] in terms of the impugned provisions imposing a "serious impingement on *Ms Banerji's* implied freedom", and stated[40] that "[t]he burden of the Code on *Ms Banerji's* freedom was indeed heavy". The Tribunal reasoned[41] that Canadian jurisprudence as to the balance to be struck between an individual government employee's "duty of fidelity and loyalty" and the "countervailing rights of public servants to take part in a democratic society" was "illuminative of the appropriate balance to be struck between the implied freedom and the fostering of an apolitical [Australian] public service". And, ultimately, the Tribunal decided[42] the matter, erroneously, on the basis "that the use of the Code as the basis for the termination of Ms Banerji's employment impermissibly trespassed upon *her* implied freedom of political communication".

---

38 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(38)].

39 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [117] (emphasis added).

40 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [119] (emphasis added).

41 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [89], [104].

42 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [120] (emphasis added).

20 As has been emphasised by this Court repeatedly, most recently before the Tribunal's decision in this matter in *Brown v Tasmania*[43], the implied freedom of political communication is not a personal right of free speech. It is a restriction on legislative power which arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution* and, as such, extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the *Constitution*[44]. Accordingly, although the effect of a law on an individual's or a group's ability to participate in political communication is relevant to the assessment of the law's effect on the implied freedom, the question of whether the law imposes an unjustified burden on the implied freedom of political communication is a question of the law's effect on political communication *as a whole*[45]. More specifically, even if a law significantly restricts the ability of an individual or a group of persons to engage in political communication, the law will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole.

21 For that reason, the way in which the Tribunal decided the matter was misconceived and the Tribunal's decision must be set aside.

The respondent's contentions

22 Before this Court, the respondent did not contend that the question of whether the impugned provisions impose a burden on the implied freedom of political communication should be decided on any basis other than the effect of the impugned provisions on political communication as a whole. Instead, she sought to argue that, upon their proper construction, the impugned provisions did not apply to what she characterised as "anonymous" communications – being

---

43 (2017) 261 CLR 328 at 360 [90], 374 [150] per Kiefel CJ, Bell and Keane JJ, 398 [237], 407 [258], 410 [262] per Nettle J, 430 [313], 466 [433], 475 [465], 476 [469] per Gordon J, 503 [559] per Edelman J; [2017] HCA 43.

44 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 25.

45 *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80] per Kiefel J; [2012] HCA 2; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553-554 [35]-[36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J; [2013] HCA 58; *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90], 374 [150] per Kiefel CJ, Bell and Keane JJ.

"communications whose immediate context evinces no connection to the speaker's status as an APS employee (eg by giving her or his name, or position as a public servant)" – and that, because the tweets which she broadcast did not *ex facie* disclose her true name or the fact of her being an employee of the APS, they were "anonymous" communications to which the impugned provisions did not apply. In the alternative, the respondent contended that, insofar as the impugned provisions purported to authorise sanctions against an APS employee for "anonymous" communications, they imposed an unjustified burden on the implied freedom of political communication and were for that reason invalid. In the further alternative, the respondent argued that, if the impugned provisions did not of themselves impose an unjustified burden on the implied freedom, the decision to terminate the respondent's employment as an employee of the APS on the basis of her "anonymous" communications was vitiated by the decision maker's failure explicitly to take into account the effect of the implied freedom.

The construction argument

23 For reasons given in the course of the hearing, the Court declined to entertain the respondent's argument that the impugned provisions did not extend to "anonymous" communications. The Court did so because the argument differed fundamentally from the way in which the respondent put her case before the Tribunal and because, if she had put it that way before the Tribunal, it is not improbable that the appellant would have called evidence illustrative of the damage to reputation and integrity of the APS likely to have been caused by so-called anonymous tweets of the kind broadcast by the respondent. Lest it be thought, however, that the respondent was thereby deprived of a real chance of demonstrating that her employment was not lawfully terminated, there is no reason to suppose that "anonymous" communications cannot fail to uphold the integrity and good reputation of the APS within the meaning of the impugned provisions.

24 As was explained in detail in the guidelines to APS employees earlier set out[46] (which were before the Tribunal), as a rule of thumb, anyone who posts material online, particularly on social media websites, should assume that, at some point, his or her identity and the nature of his or her employment will be revealed. The risk of identification which justifies that rule of thumb is obvious, and it is borne out by the facts of this case. Further, as was also explained in the guidelines to APS employees, and, too, is obvious, where an APS employee broadcasts tweets which are harsh or extreme in their criticism of the

---

46 See [17] above.

Government or Opposition or their respective policies, or of individual members of Parliament whatever their political persuasion, and the nature of the author's employment is later discovered, as it was in this case, the fact that an employee of the APS is then seen to have engaged in conduct of that kind is bound to raise questions about the employee's capacity to work professionally, efficiently and impartially; is likely seriously to disrupt the workplace; and, for those reasons, is calculated to damage the integrity and good reputation of the APS. And, where the employee broadcasts tweets commenting on policies and programmes of the employee's Department or which are critical of the Department's administration, damage to the good reputation of the APS is apt to occur even if the author's identity and employment are never discovered. In light of these considerations, it would be facile to suppose a parliamentary intention to exclude communications of the kind broadcast by the respondent.

The implied freedom argument

25 The respondent's first alternative implied freedom argument also faces difficulties at a number of levels. To begin with, contrary to the assumption which is implicit in the argument, s 13(11) does not purport to proscribe all forms of "anonymous" communications: only those which fail to "uphold" the APS Values and the integrity and good reputation of the APS within the meaning of s 13(11) of the *Public Service Act*.

26 Secondly, as was observed by the Solicitor-General of the Commonwealth, appearing on behalf of the Attorney-General of the Commonwealth (intervening), there are undoubtedly some forms of "anonymous" communication that would so damage the integrity and good reputation of the APS that, on any view of the matter, their proscription would be justified. An example would be a Permanent Secretary broadcasting "anonymous" tweets which are highly disparaging of the Minister, the Government or Opposition, Government or Opposition policy, departmental administration or implementation of policy, or departmental staff, where the identity of the author is later discovered. As that example demonstrates, it is in each case a question of fact and degree whether or not a given "anonymous" communication infringes s 13(11) by failing to uphold the APS Values and the integrity of the APS.

27 Thirdly, and critically, the respondent did not contend before the Tribunal or before this Court that, apart from the implied freedom, it would not be within the legislative competence of the Commonwealth Parliament to enact legislation in the form of s 13(11) of the *Public Service Act* requiring APS employees at all times to behave in a way that upholds the APS Values and the integrity and good reputation of the APS. Nor did the respondent contend before the Tribunal or

before this Court that, apart from the implied freedom, the sanction of dismissal imposed on her under s 15 of the *Public Service Act* for her contravention of s 13(11) of that Act would not be a lawful, proportionate response to the nature and gravity of her misconduct. Consequently, as the matter was presented to the Tribunal and this Court, the respondent must be taken to have accepted that her conduct in broadcasting the "anonymous" tweets was conduct which failed to uphold the APS Values and the integrity and good reputation of the APS within the meaning of s 13(11) and that, but for the implied freedom, the sanction of dismissal was warranted.

28 In the result, the respondent's implied freedom argument amounts in effect to saying that, despite the fact that her conduct in broadcasting the "anonymous" tweets was conduct which failed to uphold the APS Values and the integrity and good reputation of the APS, Parliament was precluded from proscribing the conduct because its proscription imposed an unjustified burden on the implied freedom of political communication. To say the least, that is a remarkable proposition.

No unjustified burden on the implied freedom

Effective burden

29 A law which prohibits or limits political communication to any extent will generally be found to impose an effective burden on the implied freedom of political communication[47]. The appellant, before the Tribunal and again before this Court, and the Attorney-General of the Commonwealth (intervening) accepted that s 10(1) in combination with s 13(11) imposes an effective burden on the implied freedom. That concession was rightly made. The restrictions which s 10(1) in conjunction with s 13(11) imposes on the ability of employees of the APS to engage in public comment on government and political matters must have a material effect on the totality of political communication. The question is whether that burden is justified according to the two part test of whether the impugned law is for a legitimate purpose consistent with the system

---

47 See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [28] per Gleeson CJ and Heydon J; [2005] HCA 44; *Wotton* (2012) 246 CLR 1 at 24 [54] per Heydon J; *Monis v The Queen* (2013) 249 CLR 92 at 142-146 [108]-[122] per Hayne J; [2013] HCA 4; *Unions NSW* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Tajjour v New South Wales* (2014) 254 CLR 508 at 578-579 [145]-[146], 582 [155]-[156] per Gageler J; [2014] HCA 35.

of representative and responsible government mandated by the *Constitution* and, if so, whether that law is reasonably appropriate and adapted to the achievement of that objective[48].

Legitimate purpose

30 Section 3 of the *Public Service Act* proclaims the "main objects" of the Act, which include establishing "an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public", providing "a legal framework for the effective and fair employment, management and leadership of APS employees", and establishing "rights and obligations of APS employees". As appears from the text and context of ss 10(1), 13(11) and 15(1), the legislative purpose of those provisions is to ensure that employees of the APS at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS. And as has been seen, the APS Values are attuned to the maintenance and protection of an apolitical public service that is skilled and efficient in serving the national interest.

31 There can be no doubt that the maintenance and protection of an apolitical and professional public service is a significant purpose consistent with the system of representative and responsible government mandated by the *Constitution*. Section 64 of the *Constitution*, which provides for the establishment of departments of state[49], and s 67, which provides for the appointment and removal of officers of the Executive Government other than Ministers[50], attest to the significance of the APS as a constituent part of the system of representative and

---

48 *Lange* (1997) 189 CLR 520 at 561-562 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2(B)] per French CJ, Kiefel, Bell and Keane JJ; [2015] HCA 34; *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [102]-[104] per Kiefel CJ, Bell and Keane JJ, 413 [271], 416 [277] per Nettle J.

49 See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 435-436 per Dawson, Toohey and Gaudron JJ; [1997] HCA 36; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 402-403 [13]-[15] per Gleeson CJ, 459-460 [210]-[212] per Gummow and Hayne JJ; [2001] HCA 51; *McCloy* (2015) 257 CLR 178 at 224 [105] per Gageler J.

50 See *Bradshaw v The Commonwealth* (1925) 36 CLR 585 at 589-590 per Knox CJ; [1925] HCA 42; *Edwards v The Commonwealth* (1935) 54 CLR 313 at 323-324 per Dixon J; [1935] HCA 84; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 92-93 [120] per Gageler J; [2016] HCA 1.

responsible government mandated by the *Constitution*. The constitutional significance of the APS is also to be understood in light of the Northcote-Trevelyan British civil service reforms of the mid-nineteenth century[51], which had been adopted by some of the Australian colonies by the time of Federation[52] and which were almost immediately after Federation adopted by the Commonwealth[53]. Thus, as was observed in *Federal Commissioner of Taxation v Futuris Corporation Ltd*[54], apolitical, skilled and efficient service of the national interest has been the ethos of the APS throughout the whole period of the public administration of the laws of the Commonwealth.

Appropriate and adapted

32 A law may be regarded as reasonably appropriate and adapted or proportionate to the achievement of a legitimate purpose consistent with the system of representative and responsible government if the law is suitable, necessary and adequate in its balance[55].

---

51 See Northcote and Trevelyan, *Report on the Organisation of the Permanent Civil Service* (1854) at 3, 6-7, 18-20. See also *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563 per Lord Greene MR.

52 See, eg, Board Appointed to Enquire into the Arrangements for the Better Organization of the Civil Service of the Colony, *Civil Service of the Colony of Victoria* (1856); *Civil Service Act 1862* (Vic); *Civil Service Act 1874* (SA). See also *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24-25 per Finn J; *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at 348-349 [54] per Finn J.

53 *Commonwealth Public Service Act 1902* (Cth).

54 (2008) 237 CLR 146 at 164 [55] per Gummow, Hayne, Heydon and Crennan JJ; [2008] HCA 32.

55 *McCloy* (2015) 257 CLR 178 at 194-196 [2(B)(3)]-[4] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328 at 368 [123] per Kiefel CJ, Bell and Keane JJ, 376 [158] per Gageler J, 416-417 [278]-[280] per Nettle J, 476-477 [473] per Gordon J; *Clubb v Edwards* (2019) 93 ALJR 448 at 462 [6], 470-471 [70]-[74] per Kiefel CJ, Bell and Keane JJ, 506-507 [266] per Nettle J, 533 [408], 544 [463] per Edelman J; 366 ALR 1 at 10, 21-22, 70, 105, 121; [2019] HCA 11.

(i) Suitability

33 A law is suitable in that sense if it exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose[56].

34 Regardless of the political complexion of the government of the day, or its policies, it is highly desirable if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections[57]. To the same end, it is most desirable if not essential that management and staffing decisions within the APS be capable of being made on a basis that is independent of the party political system, free from political bias, and uninfluenced by individual employees' political beliefs. The requirement imposed on employees of the APS by ss 10(1) and 13(11) of the *Public Service Act* at all times to behave in a way that upholds the APS Values and the integrity and good reputation of the APS represents a rational means of realising those objectives and thus of maintaining and protecting an apolitical and professional public service. The impugned provisions are suitable in the necessary sense.

(ii) Necessity

35 Where, as here, a law has a significant purpose consistent with the system of representative and responsible government mandated by the *Constitution* and it is suitable for the achievement of that purpose in the sense described, such a law is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available

---

56 *Tajjour* (2014) 254 CLR 508 at 563 [81]-[82] per Hayne J; *McCloy* (2015) 257 CLR 178 at 217 [80] per French CJ, Kiefel, Bell and Keane JJ, 232-233 [132]-[133] per Gageler J, 262 [234] per Nettle J; *Brown v Tasmania* (2017) 261 CLR 328 at 370 [132]-[133] per Kiefel CJ, Bell and Keane JJ, 418 [281] per Nettle J; *Clubb* (2019) 93 ALJR 448 at 462 [6] per Kiefel CJ, Bell and Keane JJ, 507 [266(2)] per Nettle J, 544 [463] per Edelman J; 366 ALR 1 at 10, 70, 121.

57 See and compare *McManus v Scott-Charlton* (1996) 70 FCR 16 at 25-26 per Finn J; *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 180-181 [34] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 53.

and would result in a significantly lesser burden on the implied freedom[58]. Here, the respondent's argument that the impugned provisions impose an unjustified burden on the implied freedom of political communication by proscribing "anonymous" communications thus reduces in effect to a submission that an obvious and compelling alternative to the impugned provisions would be to exclude "anonymous" communications from their scope of application.

36 The argument must be rejected. For the reasons earlier given[59], "anonymous" communications are at risk of ceasing to be anonymous, and thereby damaging the integrity and good reputation of the APS as an apolitical and professional public service. Further, as has been explained, depending on the circumstances and content of an "anonymous" communication, the communication may damage the good reputation of the APS even while it remains anonymous. Consequently, if the impugned provisions were restricted in their operation to communications other than "anonymous" communications, the impugned provisions would cease to operate as a deterrent against a significant potential source of damage to the integrity and good reputation of the APS. Restricting their operation to communications other than "anonymous" communications is for that reason not an obvious and compelling alternative to their present form[60].

37 In addition, it is to be observed for the sake of completeness that, to the extent that the respondent's argument proceeds upon an assumption that "anonymous" communications are more deserving of protection by the implied freedom than communications for which the speaker acknowledges responsibility, that assumption is not necessarily sound[61].

---

58 *Monis* (2013) 249 CLR 92 at 214 [347] per Crennan, Kiefel and Bell JJ; *Tajjour* (2014) 254 CLR 508 at 550 [36] per French CJ; *McCloy* (2015) 257 CLR 178 at 210-211 [57]-[58] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139] per Kiefel CJ, Bell and Keane JJ, 418-419 [282] per Nettle J; *Clubb* (2019) 93 ALJR 448 at 462 [6] per Kiefel CJ, Bell and Keane JJ, 505 [263], 507-508 [266(3)], [267]-[268], 509-510 [277] per Nettle J, 548 [478]-[480] per Edelman J; 366 ALR 1 at 10, 68, 70-71, 74, 125-126.

59 See [24] above.

60 See and compare *Tajjour* (2014) 254 CLR 508 at 565-566 [90] per Hayne J.

61 See *Smith v Oldham* (1912) 15 CLR 355 at 358-359 per Griffith CJ, 362-363 per Isaacs J; [1912] HCA 61.

(iii) Adequacy in balance

38 If a law presents as suitable and necessary in the senses described, it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom[62]. In this case, that directs attention to the quantitative extent of the burden and the importance of the impugned provisions to the preservation and protection of the system of representative and responsible government mandated by the *Constitution*[63].

39 In the course of argument, reference was made to the question of whether the quantitative extent of the burden imposed by the impugned provisions was affected by the range of sanctions capable of being imposed under s 15. On one view of the matter, the issue of penalty is beside the point. If a law prohibits an employee of the APS from commenting publicly in a manner which fails to uphold the integrity and reputation of the APS, the law restricts the ability of the APS employee lawfully to engage in governmental and political communication regardless of whether the penalty for contravention is large or small[64]. On another view of the matter, however, penalty is relevant because the question of whether a law imposes a burden on the implied freedom is to be assessed according to the terms and practical effect of the law and the greater the penalty the more likely it will be that the law operates as a significant deterrent to political communication[65]. A third possibility is that the relevance of penalty will

---

62 *Clubb* (2019) 93 ALJR 448 at 462 [6], 470 [66]-[69], 475 [102] per Kiefel CJ, Bell and Keane JJ, 508-509 [270]-[275] per Nettle J, 552 [497]-[498] per Edelman J; 366 ALR 1 at 10, 20-21, 28, 72-73, 131. See also *Davis v The Commonwealth* (1988) 166 CLR 79 at 99-100 per Mason CJ, Deane and Gaudron JJ (Wilson and Dawson JJ agreeing at 101); [1988] HCA 63; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31, 34 per Mason CJ, 78 per Deane and Toohey JJ, 94-95 per Gaudron J, 101-102 per McHugh J; [1992] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 324 per Brennan J; [1994] HCA 44; *McCloy* (2015) 257 CLR 178 at 219 [87], 220 [91] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328 at 422-423 [290] per Nettle J.

63 See *McCloy* (2015) 257 CLR 178 at 195 [2(B)(3)], 218 [84]-[86] per French CJ, Kiefel, Bell and Keane JJ.

64 See *Brown v Tasmania* (2017) 261 CLR 328 at 410 [262] per Nettle J.

65 See *Brown v Tasmania* (2017) 261 CLR 328 at 357-358 [81], 359 [87] per Kiefel CJ, Bell and Keane JJ.

depend on the particular circumstances of a case. Here, it may be assumed that the extent of penalty is relevant. But for reasons to be explained, the penalties that may be imposed under s 15 do not suggest that the impugned provisions are not adequate in their balance.

40 Section 15 of the *Public Service Act* provides for a range of penalties and for the selection and imposition of the appropriate penalty by the Agency Head in the exercise of discretion. As a matter of law, that discretion must be exercised reasonably[66] and, therefore, according to the nature and gravity of the subject contravention[67]. As with other civil penalties, the essence of the task is to put a price on the contravention sufficiently high to deter repetition by the contravenor and others who might be tempted to contravene[68], but bearing in mind that a penalty of dismissal must not be "harsh, unjust or unreasonable"[69]. Unquestionably, there are cases of breach of s 13(11) that are so serious in the damage done to the integrity and good reputation of the APS that the only appropriate penalty is termination of employment. The instance earlier cited of a Permanent Secretary who publicly engages in trenchant criticism of the Secretary's Minister, Government policy or departmental administration is an obvious example. By contrast, in other cases the level of the employee involved and the nature of the conduct in issue may be such that nothing more than a reprimand is warranted. And of course between those two extremes lies a range of possible situations warranting the imposition in the reasonable exercise of discretion of differing penalties according to the particular facts and circumstances of the matter. It is not the case that every employee of the APS who commits a breach of s 13(11) by broadcasting public "anonymous"

---

66 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-349 [23]-[24] per French CJ, 362 [63] per Hayne, Kiefel and Bell JJ, 370-371 [88]-[90] per Gageler J; [2013] HCA 18.

67 *Li* (2013) 249 CLR 332 at 352 [30] per French CJ, 366-367 [74]-[76] per Hayne, Kiefel and Bell JJ. See and compare *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472 per Mason CJ, Brennan, Dawson and Toohey JJ; [1988] HCA 14.

68 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; [2015] HCA 46, quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152 per French J.

69 See *Fair Work Act 2009* (Cth), Pt 3.2.

communications is liable to be dismissed. Nor is it the case that the impugned provisions provide for the imposition of a penalty which is not proportionate to the contravention. Breach of the impugned provisions renders an employee of the APS liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct.

41 Section 15(3) provides for the establishment of procedures that comply with basic procedural requirements set out in Commissioner's Directions, have due regard to procedural fairness, and may differ for different categories of APS employee. An Agency Head is 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[70]. The assessment of whether there has been a breach of s 13(11) must be undertaken in accordance with those published procedures, and, if the relevant employee is dissatisfied with the determination, the employee has a right of internal review, a further right of Tribunal merits review under s 33 – except in the case of termination of employment, in which event the employee has rights under Pt 3.2 of the *Fair Work Act 2009* (Cth) for redress for unfair dismissal on the ground of it being "harsh, unjust or unreasonable" – and a right of judicial review.

42 Given the impugned provisions have a significant purpose consistent with the system of representative and responsible government mandated by the *Constitution*, and are necessary in the sense that there is no obvious and compelling alternative, there is nothing about the procedures for the assessment of the nature and gravity of contravention of s 13(11) or the imposition of the appropriate penalty in accordance with the procedures for which s 15 provides that at all supports the idea that the benefit sought to be achieved by the impugned provisions is manifestly outweighed by their effect on the implied freedom. To the contrary, the impugned provisions, including their prescription of the range of penalties and the procedures for the assessment of breach and the imposition of penalty and review, present as a plainly reasoned and focussed response to the need to ensure that the requirement of upholding the APS Values and the integrity and good reputation of the APS trespasses no further upon the implied freedom than is reasonably justified[71].

---

70 *Public Service Act*, s 15(5).

71 *Chief of Defence Force v Gaynor* (2017) 246 FCR 298 at 324 [112] per Perram, Mortimer and Gleeson JJ.

Exercise of discretion under s 15

43 It remains to deal with the respondent's further alternative contention that the decision to terminate her employment as an employee of the APS was vitiated by the decision maker's failure to take the implied freedom into account in determining the sanction to be imposed under s 15 for breach of s 13(11). Counsel submitted that the implied freedom is an essential mandatory consideration in the exercise of the discretion and, therefore, that a decision maker's failure to consider the implied freedom constitutes a jurisdictional error which vitiates the decision[72]. Alternatively, it was submitted that, even if that were not so, the implied freedom operates as an outer limit on the range of penalties open to be imposed in exercise of the decision maker's discretion, and that, in this case, the decision maker imposed an excessive penalty of dismissal which lay beyond the boundary of the implied freedom.

44 The first of those submissions must be rejected. No doubt in one sense the implied freedom imposes a limit on the sanctions that may be imposed for a breach of s 13(11) constituted of a failure to uphold the APS Values prescribed in s 10(1). If s 15(1) provided for sanctions that were not reasonably justified having regard to the implied freedom of political communication, it may be accepted that s 15(1) would be invalid and any penalty imposed under it would be unlawful, or at least unlawful to the extent that the penalty went further than was warranted by the implied freedom[73]. But as has been explained, the prohibitions imposed by s 13(11) operating in conjunction with s 10(1) are proportionate to achieving the significant purpose of maintaining and protecting an apolitical public service skilled and efficient in serving the national interest, and the prescription of sanctions in s 15(1) that may be imposed according to law for a contravention of s 13(11) trespasses no further upon the implied freedom than is reasonably justified. Consequently, provided a decision maker imposing a penalty under s 15 acts reasonably, and so in accordance with the legal requirement that the penalty be proportionate to the nature and gravity of the contravention and the personal circumstances of the employee, there can be no risk of infringement of the implied freedom. If a decision maker imposes a manifestly excessive penalty, it will be unlawful because the decision maker has

---

72 See and compare *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J; [1986] HCA 40.

73 See *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 612-614 per Brennan J; [1986] HCA 60; *Wotton* (2012) 246 CLR 1 at 13-14 [21] per French CJ, Gummow, Hayne, Crennan and Bell JJ, 34 [91] per Kiefel J.

acted unreasonably[74], not because of the decision maker's failure to turn his or her mind to, or failure expressly to mention, the implied freedom.

45 So to conclude does not mean that the implied freedom may not be a relevant consideration in the exercise of different discretions under other legislation[75]. Whether it is may depend on the terms of the legislation and the nature and scope of the discretion. But for the reasons stated, it is no part of a decision maker's function in imposing penalty under s 15 to take the implied freedom into account. The task is to impose a penalty which accords to the nature and gravity of the subject breach and the personal circumstances of the employee in question.

46 For similar reasons, the remainder of the respondent's further alternative contention should be rejected. As has been observed[76], due to the way in which the respondent conducted her case before the Tribunal, the respondent must be taken to have accepted that her conduct in broadcasting the "anonymous" tweets was conduct which failed to uphold the APS Values and the integrity and good reputation of the APS within the meaning of s 13(11), and that, but for the implied freedom, the sanction of dismissal was warranted. It is too late now for the respondent to be permitted to contend for the first time, as it were on ultimate appeal, that the penalty imposed on her did not accord to the nature and gravity of her contraventions of ss 10(1) and 13(11) or her personal circumstances. She must be taken to have accepted that they did and, consequently, that the penalty imposed was in accordance with those provisions and so within the limits set by the implied freedom.

Conclusion

47 It follows that the appeal should be allowed. The decision of the Tribunal should be set aside. In its place, the reviewable decision of 1 August 2014 should be affirmed. The respondent should pay the appellant's costs of the appeal.

---

74 *Li* (2013) 249 CLR 332 at 348-349 [23] per French CJ. See also *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758 per Dixon J; [1937] HCA 15; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; [1947] HCA 21.

75 cf *Wotton* (2012) 246 CLR 1 at 16 [31]-[32] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

76 See [27] above.

48 GAGELER J. This proceeding, styled as an appeal on a question of law from a decision of the Administrative Appeals Tribunal, was commenced in the original jurisdiction of the Federal Court under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and was removed into the High Court under s 40 of the *Judiciary Act 1903* (Cth). The background is fully described in the reasons for judgment of the plurality.

49 Comcare and Ms Banerji agreed before the Tribunal that the termination of Ms Banerji's employment within the Department of Immigration and Border Protection was "reasonable administrative action taken in a reasonable manner in respect of [her] employment" within the meaning of s 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) unless she could establish that the termination fell outside that description "having regard to the implied freedom of political communication"[77]. That agreement meant that the only question raised for the consideration of the Tribunal in reviewing the decision of the Comcare Review Officer, which had affirmed the denial of her claim for compensation under s 14 of that Act for mental injury arising out of her employment, was whether the provisions of ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the *Public Service Act 1999* (Cth) ("the PSA") operated to infringe the constitutionally implied freedom of political communication to the extent that those provisions purported to authorise the termination of her employment. The decision of the Tribunal, to set aside the decision under review and to determine instead that Ms Banerji was entitled to compensation, followed from its conclusion that the implied freedom of political communication was so infringed.

50 The question of constitutional law which now arises for the determination of the High Court is essentially the same as the question which was raised for the consideration of the Tribunal. For reasons to be explained, however, there is no occasion to confine the question to the particular circumstances of the termination of Ms Banerji's employment. Whether ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the PSA operated to infringe the implied freedom of political communication to the extent that those provisions purported to authorise the termination of Ms Banerji's employment can and should be addressed by asking whether those provisions operate to infringe the implied freedom of political communication across the range of their potential operations.

51 Contrary to an argument put on behalf of the Australian Human Rights Commission, which was granted leave to make written submissions as amicus curiae, the proceeding raises no distinct question concerning the application of the implied freedom of political communication to an exercise of executive power. As Basten JA pointed out in *A v Independent Commission Against*

---

77 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [12].

Corruption[78], "[w]hile it is true that the implied freedom of political communication will limit the scope of executive power, it does so, at least in the case of a [repository] exercising statutory powers, by limiting the scope of legislative power".

52 And contrary to an argument put on behalf of Ms Banerji, the proceeding raises no separate question of administrative law as to whether the implied freedom of political communication was a consideration which needed to be, and was not, taken into account in the making of the administrative decisions which resulted in the termination of her employment. As Basten JA also pointed out in *A v Independent Commission Against Corruption*[79], "there is an element of conceptual confusion in the suggestion that the constitutional limit on the scope of a power is a factor which must be taken into account by [an] authority in the course of exercising the power" in that "[t]he reason why the authority does not have the power cannot sensibly be described as a condition of its exercise".

53 The answer to whether ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the PSA operate to infringe the constitutionally implied freedom of political communication across the range of their potential operations turns on whether the burden which those provisions operate to impose on freedom of political communication is a burden that is justified. The burden is justified if two conditions are satisfied. One is that the object of the impugned provisions, identified in s 3(a) of the PSA, is consistent with the constitutionally prescribed system of representative and responsible government. The other is that the impugned provisions are reasonably appropriate and adapted to achieve that identified object in a manner consistent with that constitutionally prescribed system of government.

54 The impugned provisions, in my opinion, satisfy both conditions. The object identified in s 3(a) of the PSA not only is consistent with the constitutionally prescribed system of representative government but serves positively to promote the constitutionally prescribed system of responsible government. Sections 10(1)(a), 13(11) and 15(1)(a) and (3) are narrowly tailored to achieve that object in a manner which minimally impairs freedom of political communication. The burden which the impugned provisions impose on freedom of political communication is therefore justified.

55 To explain that answer, it is necessary to start with the constitutional context within which the PSA is enacted and operates.

---

78 (2014) 88 NSWLR 240 at 256 [56].

79 (2014) 88 NSWLR 240 at 256-257 [56].

Constitutional context

56 The PSA is enacted under s 51(xxxvi) of the *Constitution* as a law with respect to the matter referred to in s 67 as "the appointment and removal of all other officers of the Executive Government of the Commonwealth" and under s 51(xxxix) as a law with respect to "matters incidental to the execution of any power vested by this Constitution in ... the Government of the Commonwealth ... or in any department or officer of the Commonwealth". The "other officers" to whom s 67 refers are officers of the Executive Government of the Commonwealth other than Ministers of State for the Commonwealth, for whom provision is made in s 64. To appreciate the special constitutional position of those other officers, it is necessary first to understand the peculiar constitutional position of Ministers.

57 Section 61 of the *Constitution* vests the executive power of the Commonwealth in the Queen and makes it exercisable by the Governor-General. Section 62 mandates establishment of a Federal Executive Council to advise the Governor-General, and s 63 provides that references to the Governor-General in the *Constitution* are to be construed as references to the Governor-General acting on the advice of the Federal Executive Council.

58 Section 64 of the *Constitution* requires Ministers to be appointed by the Governor-General "to administer such departments of State of the Commonwealth as the Governor-General in Council may establish". The Ministers so appointed are required by that section to be members of the Federal Executive Council. They hold office during the pleasure of the Governor-General and they cannot hold office for more than three months unless they become senators or members of the House of Representatives.

59 Combined with the requirements of s 6 of the *Constitution* that there must be a session of Parliament at least once in every year and of ss 7, 9, 13, 24, 28 and 32 that senators and members of the House of Representatives be "directly chosen by the people" in elections held at least once every three years, the requirement of s 64 that Ministers be or within three months of appointment become senators or members of the House of Representatives facilitates the political accountability of Ministers to the House of Representatives and to the Senate. Through the House of Representatives and the Senate, Ministers are made politically accountable to electors. The result is "that the actual government of the [Commonwealth] is conducted by officers who enjoy the

confidence of the people"[80], which is the essence of the system of responsible government for which the *Constitution* makes provision[81].

60 The political accountability of Ministers, Mason J observed in *FAI Insurances Ltd v Winneke*[82], has two elements. Each is facilitated by a different aspect of the operation of s 64 of the *Constitution*. One element, corresponding to the requirement of the section that Ministers be members of the Federal Executive Council, is the "collective responsibility" of Ministers to the Parliament and to electors for the whole conduct of the Executive Government of the Commonwealth. The other element, corresponding to the requirement of the section that Ministers be appointed to administer departments established by the Governor-General on the advice of the Federal Executive Council, is the "individual responsibility of Ministers to Parliament for the administration of their departments".

61 Enhancing the political accountability of Ministers facilitated by s 64, ss 65 and 66 of the *Constitution* make provision for the Parliament to have legislative control over the number and salaries of Ministers.

62 Against the background of the provision made in respect of the Federal Executive Council and of Ministers in ss 62 to 66, s 67 of the *Constitution* provides:

> "Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority."

It is the opening words of the section which invoke the power conferred on the Commonwealth Parliament by s 51(xxxvi) of the *Constitution* to make laws with respect to matters in respect of which the *Constitution* makes provision until the Parliament otherwise provides.

---

80 Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) at 17, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 704.

81 *Egan v Willis* (1998) 195 CLR 424 at 451 [42]; [1998] HCA 71, quoted in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 463-464 [217]; [2001] HCA 51. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 223-225 [103]-[108]; [2015] HCA 34.

82 (1982) 151 CLR 342 at 364; [1982] HCA 26.

63 The other officers of the Executive Government of the Commonwealth referred to in s 67 of the *Constitution* encompass, although are not limited to, all who might be involved in the exercise of executive power within such departments as the Governor-General in Council might from time to time establish under s 64. The ongoing conferral by s 64 of executive power on the Governor-General in Council to establish departments and the ongoing conferral by s 51(xxxvi) of legislative power with respect to the appointment and removal of officers within departments were supplemented within the scheme of the *Constitution* by the making of transitional provision for the transfer to the Commonwealth of "departments of the public service in each State" specified in s 69 of the *Constitution*. The consequence of transfer of such a department was that "all officers of the department" became by force of s 84 of the *Constitution* "subject to the control of the Executive Government of the Commonwealth" and that the transferred department itself came within the subject matter of the exclusive legislative power conferred on the Commonwealth Parliament by s 52(ii) of the *Constitution* with respect to "matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth". But officers of transferred departments also met the description of other officers of the Executive Government of the Commonwealth capable of removal under s 67, and they too were therefore within the scope of s 51(xxxvi), subject to certain rights vested in or accruing to them under State law at the time of transfer which were preserved to them by s 84[83].

64 Section 44(iv) of the *Constitution* renders all of the other officers of the Executive Government of the Commonwealth to whom s 67 of the *Constitution* refers, to the extent that they are holders of "office[s] of profit under the Crown", incapable of being chosen or of sitting as senators or as members of the House of Representatives. Officers of the Executive Government of the Commonwealth who are not Ministers are in that way disqualified from taking part in the Parliament to which Ministers are politically accountable. Their disqualification from participation in the Parliament, as was noted in *Sykes v Cleary*[84], "contributes to their exclusion from active and public participation in party politics" and, in the result, has "played an important part in the development of the old tradition of a politically neutral public service". More will be said of the development and continuation of that tradition in due course.

---

83 *Bradshaw v The Commonwealth* (1925) 36 CLR 585 at 591, 595, 597-598; [1925] HCA 42; *Edwards v The Commonwealth* (1935) 54 CLR 313 at 323; [1935] HCA 84.

84 (1992) 176 CLR 77 at 96; [1992] HCA 60. See also *Re Lambie* (2018) 92 ALJR 285 at 291 [26]; 351 ALR 559 at 566; [2018] HCA 6.

65 The overall constitutional context within which the PSA is enacted and operates is accordingly of: the administrative responsibility of Ministers for departments in which other officers of the Executive Government of the Commonwealth are involved in the exercise of executive power; the political accountability of Ministers for the administration of their departments to the House of Representatives and to the Senate; and the exclusion of those other officers from participation in the House of Representatives and in the Senate. That constitutional context informs the structure of the PSA and permeates its ethos.

Structure and ethos of the PSA

66 Like its predecessors, the *Commonwealth Public Service Act 1902* (Cth) and the *Public Service Act 1922* (Cth), the PSA is not "a law having general operation over all the members of the community". It is a law concerned exclusively with "the regulation of what is, no doubt, a very large body of people with respect to their work for and their relations with the Commonwealth", a component of which regulation involves subjecting them to a code of discipline that is enforced administratively[85].

67 Again like its predecessors, the PSA "serves public and constitutional purposes as well as those of employment"[86]. Providing as it does for "the marshalling of the human machinery to implement the exercise of executive power constitutionally vested in the Crown"[87] against the background of the inherent political accountability of Ministers for the administration of their departments to the House of Representatives and to the Senate, the PSA imposes on other officers of the Executive Government of the Commonwealth who are engaged as employees for the purposes of those departments "a number of strictures and limitations which go beyond the implied contractual duty that would be owed to an employer by many employees"[88].

68 For each department that the Governor-General in Council establishes under s 64 of the *Constitution*, the PSA establishes an office of Secretary of the department[89]. It imposes on the holder of that office responsibility for managing

---

85 *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 670-671; [1963] HCA 58.

86 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 180-181 [34]; [2008] HCA 53, citing *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24.

87 *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24.

88 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 181 [34].

89 Section 56(1) of the PSA.

the department and advising the Minister administering the department in matters relating to the department[90]. It also imposes on the holder of that office responsibility for assisting the Minister to fulfil what the PSA acknowledges to be the "Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department"[91].

69 The PSA mandates that all persons engaged as employees to perform functions in a department must be engaged under the PSA or under the authority of another Act[92]. It empowers the Secretary of a department, on behalf of the Commonwealth, to engage persons as employees for the purpose of the department[93]. Persons so engaged are referred to in the PSA as "APS employees"[94]. Together with Secretaries of departments, APS employees form part of the "Australian Public Service" ("the APS") which the PSA establishes[95].

70 The objects of the PSA and the manner in which the PSA regulates the APS continue a long tradition of professionalism and political neutrality of officers within departments of State for the administration of which Ministers of State are constitutionally responsible and politically accountable[96]. The tradition can be traced through the predecessors of the PSA to a process of public sector reform which began in the second half of the nineteenth century following recommendations in the *Report on the Organisation of the Civil Service* in the United Kingdom[97] for an end to ministerial patronage and for the creation of a permanent professional public service based on competitive recruitment and promotion processes, which were taken up and implemented by legislation after

---

90 Section 57(1) of the PSA.

91 Section 57(2) of the PSA.

92 Section 6(1) of the PSA.

93 Section 22(1) of the PSA.

94 Section 7 of the PSA (definition of "APS employee").

95 Section 9 of the PSA.

96 See *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 75-76.

97 Northcote and Trevelyan, *Report on the Organisation of the Permanent Civil Service* (1854) at 3, 9, 18-20, 22-23.

the advent of responsible government in the Australian colonies[98] and which contributed to its development[99]. The ethos which then emerged, and which has prevailed throughout the history of the Commonwealth, has been that of "an apolitical public service which is skilled and efficient in serving the national interest"[100].

71 Professor W E Hearn, who had earlier chaired a Board of Inquiry[101] and participated in a Royal Commission[102] the recommendations of which had resulted in the enactment of the first legislation for the establishment and regulation of a permanent civil service in Victoria[103], gave a useful if somewhat idealised account of the emergence of an apolitical public service and of its relationship to ministerial accountability in his treatise entitled *The Government of England*, published in Melbourne in 1867. Having stated in relation to Ministers that "[i]t is an essential part of our political system that the heads of the great executive departments, those officers who direct these departments and determine their policy, should be present in Parliament" on the basis that "[t]heir presence there is required to give due effect to the principle of parliamentary control", Professor Hearn made the point that "Parliamentary Government would soon become an intolerable nuisance" in the absence of a permanent civil service[104].

---

98 *Civil Service Act 1862* (Vic); *Civil Service Act 1874* (SA); *Civil Service Act 1884* (NSW); *Civil Service Act 1889* (Qld); *Civil Service Act 1900* (Tas); *Public Service Act 1900* (WA).

99 See Finn, *Law and Government in Colonial Australia* (1987) at 61-67, 102-108, 132-137.

100 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 164 [55]; [2008] HCA 32.

101 Victoria, Civil Service of the Colony of Victoria, *Report of the Board Appointed to Enquire into the Arrangements for the Better Organization of the Civil Service of the Colony* (1856).

102 Victoria, Civil Service Commission, *Report of the Commissioners Appointed to Inquire into and Report upon the Civil Service of the Colony* (1859).

103 *Civil Service Act 1862* (Vic).

104 Hearn, *The Government of England: Its Structure and Its Development* (1867) at 236-237.

72 Of the officers of the permanent civil service, Professor Hearn wrote[105]:

> "They are the depositaries of official traditions and the custodians of official records. It is to them that the minister must look for information, and it is to them that he must trust the execution of his designs. But these gentlemen are the servants of the Queen. It is their duty and their point of honour to give to their official superior true information, faithful advice, and loyal cooperation. It matters not to them who that superior may be, or how frequently he may be changed. Their position is the same. They are still the Queen's servants, and are bound to do the Queen's business under the orders of any officer that may in that behalf be honoured with Her Majesty's commands. Whatever may be their personal feelings or their political sympathies, all the servants of the Queen are in their official relations bound, whether individually or in concert with others, to promote to the utmost of their several powers the service to which they belong."

Professor Hearn continued[106]:

> "Such is the theory of the Constitution, and it is not contradicted by the practice. ... The Heads of Departments in all their fluctuations never abuse Her Majesty's confidence by advising the dismission of a meritorious officer on the sole ground of his political opinions. The subordinate officers are careful to avoid such an expression of their political feelings as might bring them into collision with any of their chiefs for the time being; and honourably fulfil without respect to persons their duties towards their official superior. So well is the practice now understood that scarcely has a complaint been heard for many years; and the control of the vessel of the State passes from hand to hand, as the exigencies of political affairs require, with perfect ease and with no appreciable inconvenience. The commander may be often changed, and the direction of the good ship may be altered; but the crew remains the same, equally prompt to obey every varying order, and equally skilful to carry it into execution."

73 How maintenance of a culture of political neutrality tends to support maintenance of a permanent professional public service within a system in which Ministers are constitutionally responsible and politically accountable for the administration of their departments was further explained by the Royal Commission on the Civil Service in the United Kingdom in 1915 by reference to

---

105 Hearn, *The Government of England: Its Structure and Its Development* (1867) at 238.

106 Hearn, *The Government of England: Its Structure and Its Development* (1867) at 238-239.

how the system might be expected to unravel were restrictions on political activities of public servants withdrawn. The explanation was as follows[107]:

> "Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.
>
> If this were so, the system of recruitment by open competition would prove but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system and one of the most honourable traditions of our public life."

74 Drawing attention both to the genuineness and to the amorphousness of the continuing ethos of political neutrality amongst officers of the Executive Government of the Commonwealth appointed under the predecessors of the PSA, Professor R N Spann wrote in a paper provided to the Royal Commission on Australian Government Administration in 1974[108]:

> "The permanent head and his subordinates are trained to think of themselves as implementing policies ultimately determined by their political masters, on which they have offered advice, and which may leave much scope for discretion and feedback, but which they should not consciously distort in response to other viewpoints and pressures, including their own personal preferences.
>
> This doctrine is nowhere fully defined in statutes or regulations, nor could it be effectively enforced by outside sanctions – there are too

---

107 Great Britain, Royal Commission on the Civil Service, *Fourth Report of the Commissioners* (1914) [Cd 7338] at 97 [11], quoted in *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 at 471.

108 Australia, Royal Commission on Australian Government Administration, *Appendixes to Report* (1976), vol 1 at 227 (Appendix 1.I).

> many subtle ways of hindering, or not fully backing, a policy one dislikes. It is part of the 'culture', or tradition, of the public service, a tradition whose force should not be under-estimated."

75 Giving contemporary expression to that longstanding culture or tradition, s 3(a) of the PSA states as the first of the main objects of the PSA "to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public". The other main objects of the PSA can each be seen to be designed to complement the first. They are expressed as being "to provide a legal framework for the effective and fair employment, management and leadership of APS employees"[109], "to establish rights and obligations of APS employees"[110], and to define the powers, functions and responsibilities of Secretaries (and other "Agency Heads") as well as of the Public Service Commissioner and the Merit Protection Commissioner[111], both of whom are appointed to an independent office under the PSA[112].

76 The principal method of regulation of the APS which the PSA adopts in pursuit of the object of establishing an apolitical public service is to be found in the combined operation of ss 10, 11, 12, 13 and 15.

77 Section 10 of the PSA specifies the "APS Values". The value specified in s 10(1)(a), that "the APS is apolitical, performing its functions in an impartial and professional manner", is intrinsically related to other values articulated in s 10. Those other values are respectively that the APS "is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public"[113], "is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs"[114], "delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public"[115] and "is a career-based

---

109 Section 3(b) of the PSA.

110 Section 3(d) of the PSA.

111 Section 3(c) of the PSA.

112 See Pts 5 and 6 of the PSA.

113 Section 10(1)(e) of the PSA.

114 Section 10(1)(f) of the PSA.

115 Section 10(1)(g) of the PSA.

service to enhance the effectiveness and cohesion of Australia's democratic system of government"[116].

78 Section 11(1) of the PSA requires the Public Service Commissioner to issue directions in writing in relation to each of the APS Values for the purposes of ensuring that the APS incorporates and upholds those values and determining where necessary the scope or application of the values. By force of s 11(2), the APS Values have effect for the purposes of the PSA "subject to the restrictions (if any)" in directions made under s 11(1).

79 Directions that have in fact been made by the Public Service Commissioner under s 11(1) have the effect of requiring each Secretary of a department to put in place measures directed to ensuring, and of requiring each APS employee to help to ensure, that "management and staffing decisions" in a department "are made on a basis that is independent from the political party system, political bias and political influence", and that "the same high standard of policy advice and implementation, and the same high quality professional support, is provided to the elected Government, irrespective of which political party is in power and irrespective of the [Secretary's or APS employee's] political beliefs"[117].

80 Section 12 of the PSA obliges Secretaries of departments to uphold and promote the APS Values, and s 35(2)(c) makes it a function of APS employees within the "Senior Executive Service" to promote the APS Values "by personal example and other appropriate means".

81 Section 13 of the PSA prescribes the "APS Code of Conduct", which is made applicable by force of that section to all APS employees, and which s 14(1) makes applicable in the same way to Secretaries of departments. One of the requirements of the APS Code of Conduct, prescribed in s 13(11), is that "[a]n APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS".

82 Section 15 of the PSA provides for the sole means by which the APS Code of Conduct is enforced against an APS employee. The question of whether or not an APS employee has breached the APS Code of Conduct is a question for administrative determination under procedures which the Secretary of each department must establish under s 15(3). The procedures which must be established by the Secretary must "have due regard to procedural fairness" and

---

116 Section 10(1)(n) of the PSA.

117 Clause 2.2 of the *Public Service Commissioner's Directions 1999* (Cth), read with s 42(2) of the PSA.

must comply with basic procedural requirements set out in directions issued by the Public Service Commissioner under s 15(4).

83 Only where an APS employee is found under procedures established under s 15(3) to have breached the APS Code of Conduct can the Secretary of a department exercise discretion under s 15(1) to impose a sanction for breach. The range of sanctions for which provision is made in s 15(1) is limited to those connected with employment. Termination of employment, for which provision is made in s 15(1)(a), is the most severe. The other sanctions are reduction in classification, re-assignment of duties, reduction in salary, deductions from salary by way of fine, and a reprimand.

84 The discretion to impose a sanction from within that range is subject to the usual implied conditions of a statutory conferral of discretionary power that it can be exercised only in compliance with the principles of procedural fairness and only within the bounds of reasonableness[118]. The reasonableness or unreasonableness of the imposition of any particular sanction from within the range necessarily falls to be determined in that context by reference to considerations which include whether, and if so to what extent, the sanction can be seen to be proportionate to the severity of the breach that has been found[119].

85 A finding under procedures established under s 15(3) of the PSA that an APS employee has breached the APS Code of Conduct is, in accordance with regulations made to give effect to an entitlement for which s 33(1) of the PSA provides[120], subject to merits review by the Merit Protection Commissioner. So too is a decision by a Secretary under s 15(1) to impose a sanction other than termination of employment on an APS employee who has been found to have breached the APS Code of Conduct[121].

86 The Merit Protection Commissioner lacks power to make a binding decision as a result of a review either of a finding under procedures established under s 15(3) or of a decision under s 15(1). The Merit Protection Commissioner must, however, make recommendations in a report of the review which the

---

118 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-349 [23]-[25], 362 [63], 370-371 [88]-[92]; [2013] HCA 18.

119 See, eg, *Wotton v Queensland* (2012) 246 CLR 1 at 34 [91]; [2012] HCA 2; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 352 [30].

120 Regulations 5.24(2)(a) and 5.28 of the *Public Service Regulations 1999* (Cth).

121 Regulations 5.24(2)(b) and 5.28 of the *Public Service Regulations 1999* (Cth).

Secretary is obliged to consider[122]. Having considered those recommendations, the Secretary must make a further decision confirming or varying the action that has been reviewed or setting that action aside and substituting new action[123]. The Merit Protection Commissioner, if not satisfied with the response of the Secretary, is empowered to report the matter to the Minister administering the relevant department as well as to the Prime Minister and to the President of the Senate and the Speaker of the House of Representatives for presentation to the Parliament[124].

87 A decision made by a Secretary under s 15(1) of the PSA to terminate the employment of an APS employee who has been found to have breached the APS Code of Conduct is excluded from the entitlement to review for which s 33 of the PSA provides. However, the former employee is entitled to apply to the Fair Work Commission for a remedy for unfair dismissal under Pt 3-2 of the *Fair Work Act 2009* (Cth)[125]. If the Fair Work Commission finds the termination to have been "harsh, unjust or unreasonable"[126], it can order either reinstatement or the payment of compensation[127]. Termination of employment can be found by the Fair Work Commission to be "harsh", even if it is not "unjust" or "unreasonable", "because it is disproportionate to the gravity of the misconduct in respect of which the employer acted"[128]. Moreover, the Fair Work Commission can, in the application of those statutory criteria, inquire into whether s 13(11) has been breached at all[129].

88 A decision of a Secretary to impose a sanction under s 15(1) of the PSA is also subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as is a decision of the Secretary on review of a finding of breach of the APS Code of Conduct made under procedures established under s 15(3) of the PSA. Those decisions and decisions of the Fair Work Commission

---

122 Regulations 5.28(3)(b) and 5.32(1)(a) of the *Public Service Regulations 1999* (Cth); s 33(5) of the PSA.

123 Regulation 5.32(1) and (2) of the *Public Service Regulations 1999* (Cth).

124 Section 33(6) of the PSA, read with s 7 (definition of "Presiding Officer").

125 See s 8(1) of the PSA; s 394 of the *Fair Work Act 2009* (Cth).

126 Section 385(b) of the *Fair Work Act 2009* (Cth).

127 Section 390 of the *Fair Work Act 2009* (Cth).

128 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465; [1995] HCA 24.

129 See *Cooper v Australian Taxation Office* [2015] FWCFB 868 at [18], [22].

are, of course, also subject to judicial review under s 75(v) of the *Constitution* as well as under s 39B of the *Judiciary Act*.

Burden imposed by the impugned provisions

89 The burden which any law operates to impose on freedom of political communication lies in its incremental effect on the ability of a person or persons to make or to receive communications capable of bearing on electoral choice[130]. The burden which ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the PSA operate to impose on freedom of political communication is a constraint on the scope of political communication permitted to be made by a person who is an APS employee for so long as he or she remains an APS employee. It is not a "blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy"[131].

90 The constraint which ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the PSA operate to impose on political communication by an APS employee is both substantial and directly targeted at political communication. It operates on persons within a specified class, but does not discriminate on the basis of any particular viewpoint.

91 Although a statutory incident of the relationship of employment, the constraint is not limited to a communication in which the APS employee might engage in his or her capacity as an APS employee or in the course of or for the purposes of his or her APS employment. Ms Banerji's own circumstances well enough illustrate how the constraint can extend to communications undertaken in a private capacity and which are not directly and immediately attributable to an APS employee.

92 The constraint, however, cannot be equated with a statutory prohibition enforceable in civil or criminal proceedings in a court. There are two important points of distinction.

93 First, the requirement of s 13(11) that an APS employee must at all times "behave in a way" that "upholds" the APS Value identified in s 10(1)(a) is a requirement to observe a professional standard. What it demands of a person who is an APS employee is observance of a measure of restraint or moderation in the expression of a political opinion. The precise measure is highly situation-specific and cannot readily be reduced to a set of prescriptive rules of behaviour. The level of circumspection in the expression of a political opinion that might

---

130 *Brown v Tasmania* (2017) 261 CLR 328 at 386 [188]; [2017] HCA 43.

131 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 77.

properly be expected of an APS employee in a discussion with a journalist or a member of the public, for example, might not properly be expected of that same APS employee in a discussion with a close friend or relative. Likewise, the level of circumspection that might properly be expected may depend on the APS employee's level of seniority and responsibility.

94 Second, s 13(11) in its application to s 10(1)(a) is not self-executing. Whether or not an APS employee has failed to behave in a way that upholds the APS Value identified in s 10(1)(a) is not a question that can arise for determination by a court. It is a question that has been committed to administrative determination in accordance with established procedures. What if anything flows from an administrative determination that there has been a failure to uphold that APS Value, as has already been observed, is then committed to the further administrative determination of the Secretary in the exercise of the discretion conferred by s 15(1) to impose sanctions from within the range set out in that sub-section.

95 Hence, the burden which the impugned provisions operate in practice to impose on freedom of political communication is to require a person who is an APS employee to exercise restraint and moderation in the expression of political opinion for so long as he or she chooses to remain an APS employee in order to avoid the prospect of administrative sanction which can result at worst in the person ceasing to be an APS employee.

Level and intensity of the requisite scrutiny

96 *Wotton v Queensland*[132] establishes that the validity of a law which burdens freedom of political communication by empowering an exercise of an administrative discretion is to be determined by asking in the first instance whether the burden is justified across the range of potential outcomes of the exercise of that discretion. If the burden is justified across the range of potential outcomes, that is the end of the constitutional inquiry. The law is valid and the validity of any particular outcome of the exercise of discretion is to be gauged by reference solely to the statutory limits of the discretion. There is no occasion to consider whether the scope of the discretion might be read down in order to ensure that the law is within constitutional power[133]. There is in consequence no occasion to consider whether a particular outcome might fall within the scope of the discretion as so read down, and there is accordingly no occasion to consider

---

132 (2012) 246 CLR 1 at 14 [22]-[23].

133 cf *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [10], 13-14 [21], citing *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614; [1986] HCA 60.

whether a particular outcome falls within the scope of the discretion having regard to the implied freedom[134].

97 For reasons I have sufficiently explained in the past[135], a law which confers discretion capable of being exercised to impose a direct and substantial burden on political communication is a law that requires close scrutiny corresponding to a compelling justification if it is not to infringe the implied freedom of political communication. That is the approach which, in my opinion, is properly brought to bear in considering the justification for the burden on freedom of political communication which ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the PSA operate in combination to impose.

98 That requirement for close scrutiny accords with the approach adopted by the Supreme Court of Canada in *Osborne v Canada (Treasury Board)*. There the Supreme Court held that a law which banned "all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the hierarchy of the public servant" was not "demonstrably justified in a free and democratic society" within the meaning of s 1 of the *Canadian Charter of Rights and Freedoms* on the basis that "[t]he restrictions on freedom of expression [were] over-inclusive and [went] beyond what [was] necessary to achieve the objective of an impartial and loyal civil service"[136]. The approach has since been explained as involving adoption of a "strict" test of "minimum impairment" of freedom of expression guaranteed by s 2(b) of the *Canadian Charter*[137].

99 As reference is made in the submissions of Ms Banerji and the Australian Human Rights Commission to the position under the First Amendment to the Constitution of the United States, I add for completeness that the case law in which the Supreme Court has there balanced freedom of speech of public servants against governmental interests in creating and maintaining a professional and efficient public service[138] is of marginal analogical assistance in

---

134 cf *Wainohu v New South Wales* (2011) 243 CLR 181 at 231 [113]; [2011] HCA 24.

135 *Brown v Tasmania* (2017) 261 CLR 328 at 389-391 [200]-[204]; *Clubb v Edwards* (2019) 93 ALJR 448 at 486-488 [175]-[185]; 366 ALR 1 at 43-46; [2019] HCA 11.

136 [1991] 2 SCR 69 at 100.

137 *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016 at 1070-1074 [56]-[61].

138 See *United Public Workers of America (CIO) v Mitchell* (1947) 330 US 75; *United States Civil Service Commission v National Association of Letter Carriers* (1973) 413 US 548; *United States v National Treasury Employees Union* (1995) 513 US 454; *Lane v Franks* (2014) 573 US 228.

light of the marked differences between the structure and history of executive government in Australia and in the United States.

The impugned provisions are justified

100 The object identified in the expression of the main object in s 3(a) of the PSA – "to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public" – is unquestionably legitimate in the minimally required sense that the object is consistent with the constitutionally prescribed system of representative and responsible government. Much more than that, the object is framed to enhance the practical operation of the constitutionally prescribed system of responsible government by perpetuating the ethos traditionally expected of officers of the Executive Government involved in the exercise of the executive power of the Commonwealth within departments administered by Ministers politically accountable to the Parliament.

101 The time-honoured ethos of those officers standing aside from politics enhances both the exercise of the executive power of the Commonwealth and the political accountability of Ministers for the exercise of the executive power of the Commonwealth. It does so by ensuring that the Government, the Parliament and the Australian public can have confidence that Ministers will receive from those officers what is aptly described in the Directions made by the Public Service Commissioner under s 11(1), to which reference has already been made, as "the same high standard of policy advice and implementation, and the same high quality professional support ... irrespective of which political party is in power and irrespective of [any APS employee's] political beliefs"[139].

102 Three considerations then combine to support the conclusion that ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the PSA are reasonably appropriate and adapted to achieve the identified object of establishing an apolitical public service in a manner that involves minimal impairment of freedom of political communication and that is for that reason consistent with the constitutionally prescribed system of representative and responsible government.

103 First, the requirement of s 13(11) for a person who is an APS employee to uphold the APS Values is no more than a statutory incident of a relationship of employment. It is applicable only for so long as he or she remains an APS employee and non-observance of the requirement can lead only to administrative action, the most extreme outcome of which is that the person ceases to be an APS employee by operation of an exercise of discretion under s 15(1)(a), following a finding of breach made in accordance with s 15(3).

---

139 Clause 2.2(2)(b) of the *Public Service Commissioner's Directions 1999* (Cth).

104 Second, the content of the particular APS Value spelt out in s 10(1)(a) – that "the APS is apolitical, performing its functions in an impartial and professional manner" – is tailor-made to the object in s 3(a). The vagueness in the expression of that APS Value and the intrusion of the requirement of s 13(11) to uphold it into the private life of a person who is an APS employee are unavoidable in, and no more than commensurate with, achievement of that object. The vagueness and the extent of the intrusion are both ameliorated by the requirement of s 11(1) that the Public Service Commissioner issue directions in writing in relation to each APS Value, by the requirement of s 12 that each Secretary promote the APS Values, and by the function of APS employees within the Senior Executive Service under s 35(2)(c) to promote the APS Values by personal example and other appropriate means.

105 The Tribunal was persuaded to the view that s 13(11) is overbroad in its application to s 10(1)(a) in so far as it extends to "anonymous comment" on the basis that "[a] comment made anonymously cannot rationally be used to draw conclusions about the professionalism or impartiality of the public service"[140]. That view, in my opinion, is erroneous. The error is that it focuses only on the importance of the appearance of impartiality and ignores the even greater importance of the actual observance of impartiality. Confidence cannot exist without trust, and trust cannot exist without assurance that partisan political positions incapable of being communicated with attribution will not be communicated anyhow under the cloak of anonymity. That is so irrespective of whether a particular comment made anonymously might or might not end up being attributed to its maker. The confidence of the Government, the Parliament and the Australian public in the APS as an apolitical and professional organisation would be undermined without more were an APS employee free to engage with impunity in clandestine publication of praise for or criticism of a political policy of the Government of the day or of a political party which might then or later be represented in the Parliament.

106 Third, the procedural mechanism provided in s 15(1)(a) and (3) for the administrative determination and sanctioning of a breach of the APS Code of Conduct is conditioned by requirements for the administrative decision-makers to act reasonably and to observe procedural fairness, capable of being enforced by judicial review, and is subject as well to a comprehensive system of merits review. Not only is a finding of breach in accordance with procedures established under s 15(3) subject to review and recommendation by the Merit Protection Commissioner, but termination of employment under s 15(1)(a) can result in an order for compensation or reinstatement if found by the Fair Work Commission to have been "harsh, unjust or unreasonable", including for reasons

---

140 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [116].

that the finding of breach in accordance with s 15(3) was not warranted or that termination under s 15(1)(a) was disproportionate to the gravity of the breach.

Disposition

107 For these reasons, I agree with the orders proposed by the plurality.

108 GORDON J. The respondent, Ms Banerji, commenced employment in the Australian Public Service ("the APS") with the then Department of Immigration and Citizenship[141] ("the Department") on 29 May 2006. Between, relevantly, January and July 2012, she posted on Twitter under the handle "@LaLegale". Her employment was terminated on the basis that the Twitter posts were considered to be harsh and extreme in their criticism of the government and the Department's administration.

109 As a result of the termination of her employment, Ms Banerji applied for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Compensation Act"). That Act does not permit compensation for injuries suffered "as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment"[142].

110 Ms Banerji accepted that her anonymous posts constituted conduct that failed to uphold the APS Values[143] and the integrity and good reputation of the APS within the meaning of s 13(11) of the *Public Service Act 1999* (Cth) and that, but for the implied freedom of political communication, the termination of her employment under s 15(1)(a) of that Act did constitute reasonable administrative action within the meaning of s 5A of the Compensation Act. Thus, unless Ms Banerji could establish that ss 10(1)(a) and 13(11) of the *Public Service Act* ("the impugned provisions"), read with s 15(1) of that Act, imposed an unjustified burden on the implied freedom of political communication, she had no right to compensation under the Compensation Act.

111 The impugned provisions, read in the context of the *Public Service Act* as a whole, require members of the APS, on pain of sanction, to behave at all times in a way that upholds the values of political neutrality, impartiality and professionalism, while being openly accountable to the government, the Parliament and the Australian public within the framework of ministerial responsibility[144]. The requirement to uphold the apolitical nature, integrity and good reputation of the APS not only is consistent with, but is a defining characteristic of, the constitutionally prescribed system of representative and, in particular, *responsible* government. Such values directly promote the internal character and functioning of the APS and public confidence in its capacity to serve the government of the day. They do not impose an unjustified burden on the implied freedom of political communication.

---

141 Now the Department of Home Affairs.

142 Compensation Act, s 5A(1) read with s 14(1).

143 Defined in *Public Service Act 1999* (Cth), s 10; see in particular s 10(1)(a).

144 See *Public Service Act*, s 10(1)(a), (e).

112 The facts are set out in the reasons of Kiefel CJ, Bell, Keane and Nettle JJ.

Public Service Act

113 By the *Constitution*, the appointment and removal of civil servants is vested in the Governor-General in Council until Parliament otherwise provides[145]. And Parliament has otherwise provided by the enactment of the *Commonwealth Public Service Act 1902* (Cth), the *Commonwealth Public Service Act 1922* (Cth) and, then, the *Public Service Act 1999*. This matter is concerned with the last of these Acts − the *Public Service Act 1999*[146] − by its full title, "[a]n Act to provide for the establishment and management of the Australian Public Service, and for other purposes".

114 The "main objects" of the *Public Service Act* are[147]:

> "(a) to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public; and
>
> (b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; and
>
> (c) to define the powers, functions and responsibilities of Agency Heads, the Public Service Commissioner and the Merit Protection Commissioner; and
>
> (d) to establish rights and obligations of APS employees."

115 Of particular significance to the resolution of this appeal is the interaction between certain of these stated objects: namely, establishing an *apolitical* public service that is *efficient and effective in serving the government, the Parliament and the Australian public* and, at the same time, providing a legal framework for the effective and fair employment, management and leadership of APS employees as well as establishing rights and obligations of APS employees.

116 The objects of the *Public Service Act* find further reflection in a set of provisions described as the "APS Values" for the APS. APS employees are

---

145 *Constitution*, s 67.

146 Version compiled on 21 March 2012.

147 *Public Service Act*, s 3.

required to uphold those values[148]. The APS Values, set out in s 10(1), include that:

> "(a) the APS is *apolitical*, performing its functions in an *impartial and professional* manner;
>
> …
>
> (d) the APS has the highest ethical standards;
>
> (e) the APS is *openly accountable* for its actions, *within the framework of Ministerial responsibility* to the Government, the Parliament and the Australian public;
>
> (f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
>
> (g) the APS delivers services fairly, effectively, *impartially* and courteously to the Australian public …" (emphasis added)

117 The Public Service Commissioner appointed under the *Public Service Act*[149] ("the Commissioner") *must* issue directions in writing in relation to *each* of the APS Values for the purpose of, relevantly, ensuring that the APS incorporates and upholds the APS Values[150]. The directions may qualify the scope or application of the APS Values[151]. Thus, the APS Values have effect subject to any restrictions in the directions issued by the Commissioner[152].

118 At the relevant time, in accordance with s 11(1) of the *Public Service Act*, the Commissioner had issued binding directions about the impugned provisions with the stated purposes of, among other things, ensuring that APS employees understood their responsibilities in relation to the APS Values as well as setting out the minimum requirements that APS employees were to meet in upholding them[153]. Such directions are binding on APS employees; APS employees are

---

148 *Public Service Act*, s 13(11).

149 *Public Service Act*, s 40(1).

150 *Public Service Act*, s 11(1)(a).

151 See *Public Service Act*, s 11(1)(b).

152 *Public Service Act*, s 11(2).

153 *Public Service Commissioner's Directions 1999*, cl 2.1.

required not only to inform themselves of the directions[154], but to comply with all of the directions[155].

119 In relation to upholding the APS Value in s 10(1)(a), the *Public Service Commissioner's Directions 1999* relevantly provided that[156]:

> "an APS employee must, taking into account the employee's duties and responsibilities in the Agency, help to ensure that:
>
> (a) management and staffing decisions in the Agency are made on a basis that is independent from the political party system, political bias and political influence; and
>
> (b) the same high standard of policy advice and implementation, and the same high quality professional support, is provided to the elected Government, irrespective of which political party is in power and irrespective of the employee's political beliefs."

120 As just observed, APS employees are required to uphold the APS Values. That obligation is imposed by the "APS Code of Conduct" which is set out in s 13 of the *Public Service Act* and, specifically, by s 13(11), which 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." (emphasis added)

121 Other obligations under the APS Code of Conduct are imposed on an APS employee "in the course of APS employment", including that:

> "(1) An APS employee must behave honestly and with integrity *in the course of APS employment*.
>
> (2) An APS employee must act with care and diligence *in the course of APS employment*.
>
> (3) An APS employee, when acting *in the course of APS employment*, must treat everyone with respect and courtesy, and without harassment.

---

154 *Public Service Regulations 1999* (Cth), reg 3.16.

155 *Public Service Act*, s 42(2) read with s 7 definition of "Commissioner's Directions".

156 *Public Service Commissioner's Directions 1999*, cl 2.2(2).

(4) An APS employee, when acting *in the course of APS employment*, must comply with all applicable Australian laws." (emphasis added)

122 As is evident, the extent to which an APS employee must comply with the APS Code of Conduct varies. 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 under s 13(11), whereas the obligations in s 13(1)-(4) apply "in the course of APS employment".

123 To ensure APS employees comply with the APS Code of Conduct, APS employees may be sanctioned for breaches of that Code[157]. There is a range of sanctions, including termination of employment, reduction in classification, re-assignment of duties, reduction in salary and a reprimand[158].

124 Procedures for determining whether an APS employee has breached the APS Code of Conduct are required to be established[159]. Reasonable steps must be taken to ensure that every APS employee has ready access to the documents that set out those procedures[160]. And the procedures must comply with basic procedural requirements set out in the Commissioner's directions and must have due regard to procedural fairness[161].

125 If action is taken against an APS employee in relation to their employment (described as an "APS action"), the APS employee is entitled to seek review of that action[162]. However, where the sanction is termination of employment, the review procedure is not found in the *Public Service Act*[163] but in the *Fair Work Act 2009* (Cth). Under the *Fair Work Act*, the Fair Work Commission must assess whether the termination was "harsh, unjust or unreasonable"[164].

---

157 *Public Service Act*, s 15.

158 *Public Service Act*, s 15(1).

159 *Public Service Act*, s 15(3), (4).

160 *Public Service Act*, s 15(5).

161 *Public Service Act*, s 15(3)(a), (b).

162 *Public Service Act*, s 33(1) read with s 33(7) definition of "APS action".

163 *Public Service Act*, s 33(1).

164 *Fair Work Act*, ss 385(b) and 387.

Guidelines

126 Guidelines, in the form of non-binding rules or standards[165] to guide the conduct or actions of public servants, including on participation in public debate, were published by the Public Service Board or Commission in 1979, 1987, 1995 and 2003[166]. From 2008, the Australian Public Service Commission published specific guidance with respect to online media participation[167]. Each Guideline stated that either it did not have the force of law or it was a set of principles or guidance[168]. However, the Guidelines are instructive in demonstrating that,

---

165 See *Norbis v Norbis* (1986) 161 CLR 513 at 520; [1986] HCA 17.

166 Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants*, Personnel Management Series No 1 (1979) ("1979 Guidelines"); Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants*, Personnel Management Manual Series ISSN 0810-4794 (1987) ("1987 Guidelines"); Public Service Commission, *Guidelines on Official Conduct of Commonwealth Public Servants* (1995) ("1995 Guidelines"); Australian Public Service Commission, *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads* (2003) at 7.

167 Australian Public Service Commission, Circular 2008/8 − Interim protocols for online media participation, 8 December 2008, available at <https://www.apsc.gov.au/circular-20088-interim-protocols-online-media-participation> ("Circular 2008/8"); Australian Public Service Commission, Circular 2009/6: Protocols for online media participation (social media), 18 November 2009, available at <https://www.apsc.gov.au/circular-20096-protocols-online-media-participation-social-media> ("Circular 2009/6"); Australian Public Service Commission, Circular 2012/1: Revisions to the Commission's guidance on making public comment and participating online (social media), January 2012, available at <https://www.apsc.gov.au/circular-20121-revisions-commissions-guidance-making-public-comment-and-participating-online-social> ("Circular 2012/1"); Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for APS Employees* (2017). See also Australian Public Service Commission, *Values and Code of Conduct in Practice* (2017) at 53-55 [1.15]-[1.16].

168 1979 Guidelines at v; 1987 Guidelines at 14 [6.1]; 1995 Guidelines at iii; Australian Public Service Commission, *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads* (2003) at 7; Circular 2008/8 at [3]; Circular 2009/6 at [4]; Circular 2012/1 referring to "general principles"; Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for APS Employees* (2017) at 2; Australian Public Service Commission, *Values and Code of Conduct in Practice* (2017) at 4, cf at 10 [1.4.2].

for decades, the regulation of public comment by public servants has been undertaken for the purpose of maintaining an apolitical and impartial public service.

127 The *Guidelines on Official Conduct of Commonwealth Public Servants* published in 1979 ("the 1979 Guidelines") described the "starting point" for establishing guidelines on public comment by public servants as "the need *to preserve the neutrality of the public service*"[169] (emphasis added). It was in that context that the 1979 Guidelines later said[170]:

> "5.1 The political framework in Australia assumes the existence and continued maintenance of a *non-partisan* Public Service capable of serving a government of any political colour with *impartiality and loyalty*.
>
> 5.2 In this context, there has been some uncertainty in the past as to the legitimate scope of political activity by public servants. Typical situations in which the question has arisen have involved public servants campaigning for candidates in elections, the wearing of badges and other items of political propaganda, the use of government property to display political material, and the entering into public debate on party political issues.
>
> 5.3 It is recognised that public servants should not be precluded from participating, as citizens in a democratic society, in the political life of the community. Indeed it would be inappropriate to deprive the political process of the talent, expertise and experience of certain individuals simply because they are employed in the public sector.
>
> 5.4 *At the same time, it is necessary to safeguard the political neutrality of the Public Service*. Public servants have the same political rights as other citizens but the special character of the Public Service imposes particular obligations on public servants to avoid becoming personally associated with particular political stances. In particular, public servants should not use official positions to propagate political views, and their conduct should not impair the *non-partisan nature and reputation of the Service*. This is particularly applicable when the performance of their duties brings them into contact with members of the public or other individuals or organisations outside government employment.

---

169 1979 Guidelines at 34 [4.26].

170 1979 Guidelines at 47-50.

...

5.20 ... [S]taff should avoid becoming involved in public controversy where this could prejudice the identity of a politically impartial career public service.

5.21 As in other situations, the 'improper conduct' provision of section 55 of the Public Service Act could be used in serious cases. However, it could be expected that counselling, rather than disciplinary action, would normally suffice." (emphasis added)

128 The updated *Guidelines on Official Conduct of Commonwealth Public Servants* published in 1987 ("the 1987 Guidelines") referred to the "right of public servants as members of the community to make public comment and enter into public debate on [political] issues"; however, the type of public comment envisaged was "[r]easoned public discussion on the factual technical background to policies and administration" which could "lead to better public understanding of the processes and objectives of government"[171]. The 1987 Guidelines acknowledged that, "because of the nature of public service employment and the relationship between the public service and the elected Government, *there [were] some circumstances in which public comment [was] inappropriate*"[172] (emphasis added).

129 Ultimately, the Public Service Board's views on "the propriety of public comment derive[d] from ... the need to preserve a public service based on professionalism and integrity capable of efficiently serving the government of the day and the need to maintain public confidence that this [was] the case"; and it stated that public servants "should refrain from those sorts of public comments which [were] in conflict with those duties"[173].

130 The updated *Guidelines on Official Conduct of Commonwealth Public Servants* published in 1995 ("the 1995 Guidelines") were in similar terms to the 1987 Guidelines and acknowledged that, "because of the nature of public service employment and the working relationship with the elected government", inappropriate public comment would include a comment that was "so harsh or extreme in its criticism of the government or its policies that it indicate[d] that

---

171 1987 Guidelines at 14 [6.2].

172 1987 Guidelines at 14 [6.3].

173 1987 Guidelines at 15 [6.5].

the public servant concerned [was] incapable of professionally, efficiently or *impartially* performing his or her official duties"[174] (emphasis added).

131 In 2003, the Australian Public Service Commission published *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads*. This Guide stated that[175]:

> "[t]he principles of apoliticism, impartiality, professionalism, responsiveness and accountability are at the heart of strong, productive relationships between the APS and the elected government … APS employees, Ministers and Parliamentarians operate under the law within a democratic political system in which there is ultimate accountability of governments to the Australian people through the electoral process … Ministers and governments as the elected representatives of the Australian people determine and define the public interest. Public servants advise and implement − assisting governments to deliver their policy agenda and priorities."

Its guidance on making public comment was in similar terms to the 1995 Guidelines[176].

132 Guidance published by the Australian Public Service Commission from 2008 reinforced and applied the same principles to participation in online media[177]. Initially, the Commission's interim position was that "it would be harder to make a case for a breach of [the APS Code of Conduct]" for anonymous participation in online communication forums or if the APS employee used a nom de plume[178]. However, the Commission maintained that the issue "would need to be considered on a case by case basis" and that, ultimately, APS employees were required to avoid comment that might

---

174 1995 Guidelines at 34-35.

175 Australian Public Service Commission, *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads* (2003) at 20.

176 See Australian Public Service Commission, *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads* (2003) at 30-31.

177 See Circular 2008/8; Circular 2009/6; Circular 2012/1; Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for APS Employees* (2017).

178 Circular 2008/8, "Private use of online media".

"compromise[] perceptions of the employee's ability to do his/her job in an unbiased or professional manner"[179]. In 2009, the Commission replaced this interim guidance with an updated guidance that set out "ground rules" for online media participation, which included being "apolitical, impartial and professional"[180].

133 A further updated guidance applied to Ms Banerji from January 2012[181], including at the time of the internal investigation into her conduct. It clarified that "APS employees must still uphold the APS Values and Code of Conduct even when material is posted anonymously" and that "[a]s a rule of thumb, irrespective of the forum, anyone who posts material online should make an assumption that at some point their identity and the nature of their employment will be revealed"[182]. Even in an unofficial capacity, it was not appropriate to "make comment that is, or could be perceived to be … compromising the APS employee's capacity to fulfil their duties in an unbiased manner"; "so harsh or extreme in its criticism of the Government … that it raises questions about the APS employee's capacity to work professionally, efficiently or impartially"; or "compromising public confidence in the agency or the APS"[183].

Implied freedom of political communication

134 It is against that background that the contention that the impugned provisions, read with s 15(1) of the *Public Service Act*, imposed an unjustified burden on the implied freedom of political communication is to be assessed.

135 The implied freedom of political communication is a limit on legislative and executive power[184].

---

179 Circular 2008/8, "Private use of online media".

180 Circular 2009/6, "Attachment A".

181 Circular 2012/1.

182 Circular 2012/1, "Commenting online in an unofficial capacity".

183 Circular 2012/1, "Making public comment in an unofficial capacity − general principles".

184 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, 567; [1997] HCA 25; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; [2011] HCA 4; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]; [2013] HCA 58; *Tajjour v New South Wales* (2014) 254 CLR 508 at 558 [59], 577 [140]; [2014] HCA 35; *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 407 [258], 430 [313]; [2017] HCA 43.

Burden

136 It is necessary to begin consideration of the argument that the implied freedom is infringed by the impugned provisions by understanding what is said to be beyond power. In the case of legislation, it is necessary to begin with the proper construction and application of the impugned provisions to identify, and understand, what is said to be the nature and extent of the asserted burden[185].

137 Here, the appellant and the Attorney-General of the Commonwealth correctly accepted that s 13(11), read with s 10(1)(a), of the *Public Service Act* effectively burdens the implied freedom of political communication because together they restrict the capacity of APS employees to engage in political communication[186].

138 It is, however, necessary to identify the legal and practical operation and effect of those provisions within the framework of the relevant statutory scheme. First, the impugned provisions cannot be read in isolation. In understanding the legal and practical operation of the provisions, the content *and process* of the statutory scheme, including s 15 of the *Public Service Act*, must be considered. In particular, ss 13(11) and 10(1)(a) are not self-executing. They are only given legal "teeth" through determination of breach.

139 Second, the impugned provisions are directed to a specific group of people, "APS employees". The provisions are targeted. They do not apply to the public at large.

140 Third, the impugned provisions do not, in their terms, directly target political communication. The provisions are directed at the *conduct* of APS employees "at all times", not just in the course of employment, but not all conduct. A "nexus" is required: the *conduct* must fail to uphold the APS Values and, further or alternatively, the integrity and good reputation of the APS. Whether the specific conduct is caught will necessarily require an evaluative judgment that will depend on the seniority of the APS employee, when, where and how any public comment is made, and the language and tone of the comment. Specifically, not all public comment by a public servant will be found to be in breach of the statutory scheme – only those comments that fail to uphold the APS Values or the integrity and good reputation of the APS and, thus, fail to uphold an essential part of what is necessary for responsible

---

185 *Brown* (2017) 261 CLR 328 at 433-434 [325]-[326], citing *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158]; [2004] HCA 39 and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

186 See *Unions NSW* (2013) 252 CLR 530 at 555 [40].

government. It will be necessary to return to address the role of the APS in the constitutionally prescribed system of *responsible* government.

141 Fourth, the content of the burden is transparent. The scheme of the *Public Service Act* imposes distinct procedures for determination of breach[187], which include merits review as well as independent assessment of the appropriateness of the sanction.

Legitimate end or purpose

142 The task of deciding whether the impugned provisions are appropriate and adapted to a legitimate end or purpose requires identification of that end or purpose. Here, as will be seen, the purpose of the impugned provisions (and of the action taken against Ms Banerji) was to maintain an apolitical public service of integrity and good reputation.

143 Identification of the purpose of the impugned provisions requires an examination of the text of the *Public Service Act*, construed as a whole, in the context of the historical and constitutional importance of that purpose. It is necessary, therefore, to say something further about the objective of establishing an *apolitical* public service that is *efficient and effective in serving the government, the Parliament and the Australian public*, a main object of the *Public Service Act*, found in s 3(a) of that Act.

144 That object is given further and specific content in the APS Values set out in s 10(1) of the *Public Service Act*. Section 10(1)(a) provides that "the APS is apolitical, performing its functions in an impartial and professional manner" and, as noted, cl 2.2 of the *Public Service Commissioner's Directions 1999* requires that the same high standard of policy advice and implementation be provided to the elected government irrespective of which political party is in power and irrespective of the public servant's political beliefs[188].

145 Section 10(1)(e) provides that "the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public". It explains that the object in s 3(a) of being "an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public" is secured, at least in part, by the APS being openly accountable for its actions within the framework of ministerial responsibility.

---

187 See [124]-[125] above.

188 *Public Service Commissioner's Directions 1999*, cl 2.2(2)(b).

146 Securing accountability of government activity is the very essence of "responsible government" − the system of government by which the executive is responsible to the legislature. Responsible government is "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament"[189]. The concept of responsible government has several aspects. One aspect is that "the ministry must command the support of the lower House of a bicameral legislature upon confidence motions"[190]. This establishes a mechanism by which the executive government is responsible to Parliament. Specifically, at the Commonwealth level, the government requires the ongoing support of the House of Representatives.

147 Another aspect of responsible government is that in general the Governor or Governor-General defers to, or acts upon, the advice of his or her Ministers and not otherwise[191]. Mason J described this aspect in *FAI Insurances Ltd v Winneke* as "a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government"[192]. However, his Honour noted that the Governor or Governor-General might in particular instances question the advice, suggest modifications or ask the ministry to reconsider it[193].

148 Equally important to responsible government is the concept of ministerial responsibility. Ministerial responsibility means "the individual responsibility of Ministers to Parliament for the administration of their departments, and ... the collective responsibility of Cabinet to Parliament (and the public) for the whole conduct of administration"[194]. Put in different terms, it is "through ministers that the whole of the administration − departments, statutory bodies and agencies of one kind and another − is responsible to the Parliament

---

189 *Egan v Willis* (1998) 195 CLR 424 at 451 [42]; [1998] HCA 71, quoting Kinley, "Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices" (1995) 18 *University of New South Wales Law Journal* 409 at 411.

190 *Egan* (1998) 195 CLR 424 at 453 [45].

191 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364-365; [1982] HCA 26.

192 (1982) 151 CLR 342 at 364.

193 *FAI Insurances* (1982) 151 CLR 342 at 365.

194 *FAI Insurances* (1982) 151 CLR 342 at 364.

and thus, ultimately, to the people"[195]. Ministerial responsibility is achieved because Ministers sit in, and are answerable to, Parliament. As Gaudron, Gummow and Hayne JJ explained in *Egan v Willis*[196]:

> "Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. ... The circumstance that Ministers are not members of a chamber in which the fate of administration is determined [through confidence motions] does not have the consequence that [this] aspect of responsible government ... does not apply to them."

149 And the principle of responsible government is an integral element of the *Constitution.* It is sourced, and finds reflection, in several provisions. In particular, s 64 of the *Constitution* – providing that Ministers, appointed by the Governor-General, must be senators or members of the House of Representatives if they serve longer than three months – makes plain that the intended system is one of responsible government[197]. Features of responsible government have also been discerned in ss 6, 49, 62 and 83[198]. The significance of responsible government is, moreover, implicit in the constitutional text. Responsible government has been described as part of the fabric on which the written words of the *Constitution* are superimposed[199]. It is among the "constitutional imperatives which are intended – albeit the intention is imperfectly effected – to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people"[200].

150 Within this system of responsible government, public servants work for Ministers, who are in turn responsible to Parliament. That work includes, for example, advising upon and implementing ministerial decisions –

---

195 Australia, Royal Commission on Australian Government Administration, *Report* (1976) at 59 [4.2.1].

196 (1998) 195 CLR 424 at 453 [45].

197 See *McCloy v New South Wales* (2015) 257 CLR 178 at 224 [106]; [2015] HCA 34.

198 *Lange* (1997) 189 CLR 520 at 558-559.

199 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135; [1992] HCA 45, quoting *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413; [1926] HCA 8.

200 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47; [1992] HCA 46.

regardless of which party or parties have formed government[201]. Ministerial responsibility to Parliament necessarily entails "loyalty of civil servants to Ministers, and by the same token their anonymity and neutrality"[202].

151 Thus, the object in s 3(a) of the *Public Service Act* involves being accountable to the government, the Parliament and the Australian public as understood by the constitutional concept of "responsible government". It is in that context that s 13(11) expressly connects the APS Values with the conduct of an APS employee. Section 13(11) specifically states that an APS employee, at all times, must behave in a way that upholds the APS Values. That requirement is not limited to the APS Value in s 10(1)(a); in its terms, the requirement extends to and includes the APS Value in s 10(1)(e), relevant to the further requirement in s 13(11) of requiring an APS employee to behave in a way that upholds the integrity and good reputation of the APS. That is, upholding both the internal character and functioning of the APS (relevant to upholding "integrity") and the public perception of the APS (relevant to upholding "reputation") is necessary for the proper functioning of responsible government.

152 The need for an apolitical APS is also specifically addressed in s 32 of the *Public Service Act*. An APS employee has a "[r]ight of return" to employment with the APS if they decide to contest an election and are unsuccessful; however, the APS employee must resign to contest the election and, once the person is re-employed, they again become subject to the APS Code of Conduct.

153 Thus, the *Public Service Act* in its terms regulates the conduct of APS employees so as to enhance the effective functioning of the APS as an apolitical organisation of integrity and good reputation in furtherance of the structure of responsible government established by the *Constitution*. And, in doing so, the *Public Service Act* requires APS employees to behave in a way that upholds *both* the internal character and functioning of the APS *and* the public perception of the APS.

---

201 See [118]-[119] above.

202 Parker, "Official Neutrality and the Right of Public Comment: I. The Implications of the Bazeley Case" (1961) 20 *Australian Journal of Public Administration* 291 at 294.

154 That objective has a long, and important, history[203]. The way in which it has been implemented by the various iterations of the *Public Service Act* has varied[204]. But its importance cannot be overstated.

155 The need for, and importance of, an apolitical public service is not limited to the internal character and functioning of the APS. It is essential to upholding the constitutionally prescribed system of representative and responsible government and, no less importantly, the public's perception of that system. It is a defining characteristic of the system of responsible (and representative) government for which the *Constitution* provides. Accordingly, maintenance of an apolitical public service is a legitimate end or purpose.

Justification

156 Thus, the impugned provisions and the associated executive action are directed wholly to maintenance of an apolitical public service, a defining characteristic of the constitutionally prescribed system of responsible government. The impugned provisions and the executive action taken in relation to Ms Banerji have *no* other purpose or effect.

---

203 See, eg, Northcote and Trevelyan, *Report on the Organisation of the Permanent Civil Service* (1854) at 3; Victoria, *Civil Service of the Colony of Victoria: Report of the Board Appointed to Enquire into the Arrangements for the Better Organization of the Civil Service of the Colony* (1856) at 4-5, 13; *Civil Service Regulations 1861* (SA), regs 1 and 2 (*South Australian Government Gazette*, 5 December 1861 at 1024); *Civil Service Act 1862* (Vic), ss 28 and 29; Earl Grey, *Parliamentary Government Considered with Reference to Reform*, new ed (1864) at 235, 329-332; *Regulations for the Civil Service of Victoria 1866* (Vic), regs 21, 23, 32 (*Victoria Government Gazette*, No 2, 8 January 1867 at 38-39); *General Regulations for the Conduct of Officers of the Civil Service 1874* (SA), regs 17, 18, 28 (*South Australian Government Gazette*, No 35, 27 August 1874 at 1712-1714); Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 June 1901 at 1080, 1093, 1112; *Commonwealth Public Service Act 1902*, ss 46(1) and 79(1)(a); *Regulations made under the Provisions of the Commonwealth Public Service Act 1902* (Cth), reg 41 (*Commonwealth of Australia Gazette*, No 60, 23 December 1902 at 630); McLachlan, *First Annual Report on the Public Service by the Public Service Commissioner* (1904) at 65; *Regulations under the Commonwealth Public Service Act 1902* (Cth), reg 41, inserted by SR 1909 No 50; Victoria, *Final Report of the Royal Commission on the State Public Service* (1917) at 6-10; *Commonwealth Public Service Act 1922*, ss 55(1)(e), 66, 91(1)(a); *Commonwealth Public Service Regulations 1923* (Cth), regs 34 and 35.

204 See, eg, [126]-[133] above.

157 Moreover, the scope and application of the impugned provisions are both tailored and limited. The impugned provisions apply only to those who are members of the APS and only for so long as they are employed by the APS[205]. The impugned provisions do not directly target political communication. The provisions target only that *conduct* of APS employees that is capable of failing to uphold the APS Values and, further or alternatively, the integrity and good reputation of the APS. And APS employees do not act in a vacuum. APS employees are provided with binding directions[206], and guidance[207], in relation to the scope and application of the impugned provisions.

158 And, as has been explained, the impugned provisions are not self-executing[208]. The impugned provisions provide for both a just and appropriate sanction and transparency[209] in that their application requires procedural fairness and is subject to review.

159 Given the closeness of the means to the legitimate end or purpose, those observations conclude the issue.

160 Attempts to carve out some subset of "anonymous" political interventions or communications create an illusory category. It is illusory because it focuses on the instant at which the communication is made without regard to the fact that anonymity can and often eventually will be lost. And when it is lost, the damage done is that it is then seen that the member of the APS was *not* apolitical. That causes harm to the internal functioning of the APS and the public's perception of the APS as an apolitical, impartial and professional part of the executive government and, thus, to a defining characteristic of the constitutionally prescribed system of government.

161 I have said elsewhere that consideration of the application of the implied freedom should be approached on a case-by-case basis and that, consistent with the common law method of adjudication, there can be no "one size fits all" approach[210]. This appeal illustrates why. Determination of the nature and extent

---

205 See [139]-[140] above.

206 See [117]-[118] above.

207 See [132]-[133] above.

208 See [138] above.

209 See [141] above.

210 See *McCloy* (2015) 257 CLR 178 at 280-282 [306]-[311], 287-289 [336]-[339]; *Brown* (2017) 261 CLR 328 at 477 [476]; *Clubb v Edwards* (2019) 93 ALJR 448 at 530 [391], 531 [399]; 366 ALR 1 at 101, 103; [2019] HCA 11.

of the burden cannot be left to the end of the analysis. In this appeal, upon the proper construction and operation of the impugned provisions, and the executive action taken under the *Public Service Act*, the only purpose, operation or effect of the impugned provisions is to preserve a defining characteristic of responsible government. The connection between those provisions and that executive action and the maintenance of the constitutionally prescribed system of representative and responsible government is immediate and direct. Section 15(1) of the *Public Service Act* and the associated mechanisms for the application of the impugned provisions ensure that the impugned provisions have no operation beyond preservation of a defining characteristic of responsible government. No greater justification is required.

Conclusion and orders

162 For those reasons, I agree with the orders proposed by Kiefel CJ, Bell, Keane and Nettle JJ.

EDELMAN J.

Introduction

163 In *Clubb v Edwards*[211], this Court unanimously upheld the validity of Tasmanian legislation imposing swingeing restrictions upon political communication by persons seeking to protest in relation to pregnancy terminations. The "appeal" on a question of law[212] from the Administrative Appeals Tribunal ("the Tribunal") in this case, removed into this Court from the Federal Court of Australia, involves restrictions upon political communication that have historically been even further reaching. Those restrictions are now embodied in sub-s (11) of the Australian Public Service ("APS") Code of Conduct ("the Code") contained in s 13 of the *Public Service Act 1999* (Cth). Section 13(11) requires public servants in the APS to behave in a way that upholds "the APS Values"[213], which include the APS being "apolitical"[214]. One of the possible sanctions provided in s 15(1) for breach of the Code by a public servant is termination of employment. That sanction was imposed on Ms Banerji on 13 September 2013[215]. But the Tribunal held that the act of termination was unlawful because it "trespassed on the implied freedom of political communication"[216].

164 For much of the century since Federation, any public expression of political opinion by a Commonwealth public servant could be grounds for termination of employment. However, the absolute ban on public political communication by public servants has been tempered. When considered in light of its history and context, the Code that now regulates their behaviour no longer

---

211 (2019) 93 ALJR 448; 366 ALR 1; [2019] HCA 11.

212 *Administrative Appeals Tribunal Act 1975* (Cth), s 44. See *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 79-80 [15]; [2001] HCA 49; *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 331-332 [18]; [2010] HCA 24.

213 See *Public Service Act 1999* (Cth), s 10.

214 See, at the relevant time, *Public Service Act*, s 10(1)(a). See, now, s 10(5).

215 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(36)].

216 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [7]; see also at [120], [128].

turns public servants into lonely ghosts[217]. But, properly interpreted, it still casts a powerful chill over political communication. In the United States, where "citizens do not surrender their First Amendment rights by accepting public employment"[218], legislative restrictions of the nature adopted historically in Australia would be struck down as unconstitutional in a heartbeat[219]. But, unlike the United States, in Australia the boundaries of freedom of speech are generally the province of parliament; the judiciary can constrain the choices of a parliament only at the outer margins for reasons of systemic protection. The freedom of political communication that is implied in the Commonwealth *Constitution* is highly constrained. It is not an individual freedom. It is an implied constraint that operates directly upon legislative power. It does so by restricting that power only so far as *necessary* for the effective functioning of the system of representative and responsible government manifested in the structure and text of the *Constitution*, particularly ss 7, 24, and 128, as well as ss 62 and 64.

165 This requirement of necessity that constrains the implied freedom of political communication means that freedom of political communication is not a trump over other values that are sought to be implemented in legislation that gives effect to government policy. It is also necessary for the effective functioning of representative and responsible government for parliament to make, and the executive to implement, policy decisions that promote other values. The need to respect parliamentary policy is reflected in the proper application of the adequacy in the balance stage of structured proportionality testing, which requires great latitude in the assessment of whether the implied freedom has been contravened by laws that implement important parliamentary policy[220]. This case is an illustration of this point.

166 Despite the deep and broad constraints on freedom of political communication imposed by s 13(11), in the context of the APS Values and with the sanctions in s 15(1) of the *Public Service Act*, the law is reasonably necessary and adequately balanced given the place of its legitimate policy purpose in Australia's constitutional tradition and the importance of that purpose to

---

217 See also *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 76, quoting *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 at 466-467.

218 *Lane v Franks* (2014) 573 US 228 at 231.

219 See *Pickering v Board of Education* (1968) 391 US 563; *Lane v Franks* (2014) 573 US 228.

220 *Clubb v Edwards* (2019) 93 ALJR 448 at 551-552 [495]-[498]; 366 ALR 1 at 130-131.

responsible government. The legislation is valid in all of its applications. The appeal should be allowed and orders made as proposed in the joint judgment.

The primary issue on this appeal: constitutional validity of ss 13(11) and 15

167 I gratefully adopt the facts relevant to this appeal as set out in the joint judgment. As the joint judgment explains, the Tribunal concluded that the decision to terminate Ms Banerji's employment pursuant to ss 13(11) and 15(1) of the *Public Service Act* was not "reasonable administrative action" within s 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The only issue raised by the questions removed into this Court from the Federal Court, which was also the only issue raised before the Tribunal[221], is the impact of the implied freedom of political communication upon ss 13(11) and 15 of the *Public Service Act*.

168 The questions before this Court reduce to whether those provisions, as they were on 15 October 2012, are consistent with the implied freedom of political communication and, if not, then whether the exercise of discretion under those provisions must occur consistently with the implied freedom of political communication. The questions before this Court, like the issues before the Tribunal, are not concerned with whether ss 13(11) and 15, properly interpreted and applied, would lead to the conclusion that the decision to terminate Ms Banerji's employment was not "reasonable administrative action taken in a reasonable manner"[222]. Although Ms Banerji's primary submission in this Court effectively sought to agitate such a ground, by arguing that s 13(11) does not apply to anonymous communications, this Court, as the joint judgment explains, declined to entertain that submission.

169 It is, however, essential to interpret s 13(11) in order to assess whether, together with the sanctions for its breach in s 15(1), it contravenes the implied freedom of political communication. The implied freedom of political communication does not operate in a vacuum. It operates upon the meaning of legislation.

170 The first of Ms Banerji's alternative submissions was that if ss 13(11) and 15(1) apply to anonymous communications then they impose an unjustified burden on the implied freedom of political communication. In contrast, the primary submission of the Attorney-General of the Commonwealth (whose submissions were adopted by Comcare) was that ss 13(11) and 15(1) of the *Public Service Act* can apply to anonymous communications and that they are valid in all of their applications.

---

221 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [3(38)].

222 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 5A.

The meaning of s 13(11) and the APS Values

171 For nearly three-quarters of a century, a rule was maintained in Australia prohibiting public servants from making public comment on political matters. A regulation made under the authority of the *Commonwealth Public Service Act 1902* (Cth)[223] provided that public servants "are expressly forbidden to publicly discuss or in any way promote political movements". In 1909, the prohibition was amended to prohibit public comment "upon the administration of any Department of the Commonwealth"[224]. In 1923, the prohibition was again included in part of the scheme, in regs 32 and 34 of the *Commonwealth Public Service Regulations*[225]. Regulation 32 provided for general duties of public service officers, including: devoting themselves exclusively and zealously to the discharge of public duties during the hours of official business; behaving at all times with courtesy to the public, giving prompt attention to all reasonable requirements; and obeying promptly all instructions given to them by officers under whose control or supervision they are placed. Regulation 34 then provided:

> "An officer shall not –
>
> (a) publicly comment upon any administrative action or upon the administration of any Department; or
>
> (b) use for any purpose, other than for the discharge of his official duties, information gained by or conveyed to him through his connexion with the Service."

172 The prohibition upon public comment remained broadly in this form until 1974[226]. But the introduction of the modern behavioural duty of public servants

---

223 *Regulations made under the provisions of the Commonwealth Public Service Act 1902* (Cth), reg 41 (*Commonwealth of Australia Gazette*, No 60, 23 December 1902 at 630).

224 See *Provisional Regulation under the Commonwealth Public Service Act 1902* (Cth) Statutory Rule No 6 of 1909; *Regulations under the Commonwealth Public Service Act 1902* (Cth) Statutory Rule No 50 of 1909.

225 Statutory Rule No 93 of 1923.

226 See *Commonwealth Public Service Regulations* (Cth) Statutory Rule No 18 of 1935, reg 34; *Regulations made under the Commonwealth Public Service Act 1922-1947* (Cth) Statutory Rule No 146 of 1947; *Regulations under the Public Service Act 1922-1973* (Cth) Statutory Rule No 15 of 1974, reg 3; *Regulation under the Public Service Act 1922-1973* (Cth) Statutory Rule No 98 of 1974.

broke from that historical prohibition. The modern expression of the duty owes much to the Royal Commission on Australian Government Administration, which, in 1976, recommended that "except as expressly provided by an Act or regulation ..., a government employee should be free to exercise the civil and political rights, liberties and privileges generally enjoyed by citizens"[227]. This recommendation was seen as necessary to discourage impediments being placed in the way of staff who, amongst other things, "wish to make some public comment"[228]. The Royal Commission also recommended the creation of specific statutory duties, including a duty that "a person employed shall not behave in his official capacity in a manner amounting to improper conduct"[229]. When discussing whether the duty should extend to "improper conduct" outside the performance of professional duties, the Royal Commission decided against such inclusion, saying that behaviour in a public servant's private life "is relevant only in so far as it bears generally or specifically upon the performance of official duties"[230]. Further, the Royal Commission considered that "matters such as degrees of political activity ... are best left to the discipline of social pressure by the relevant peer groups, including consideration by any collective departmental management arrangements"[231].

173 In response to the recommendations of the Royal Commission and a report of a sub-committee of the Joint Council of the Australian Public Service[232], a new reg 8A was introduced in 1987[233]. The Explanatory Statement to the 1987 legislation quoted from that report, which had described reg 32 as "antiquated", and said that the new reg 8A took into account the recommendation of the Royal Commission "so as to provide a modern and clearly expressed

---

227 Australia, Royal Commission on Australian Government Administration, *Report* (1976) at 233 [8.5.55], recommendation 197.

228 Australia, Royal Commission on Australian Government Administration, *Report* (1976) at 233 [8.5.55].

229 Australia, Royal Commission on Australian Government Administration, *Report* (1976) at 235 [8.5.64(g)], recommendation 199.

230 Australia, Royal Commission on Australian Government Administration, *Report* (1976) at 236 [8.5.65].

231 Australia, Royal Commission on Australian Government Administration, *Report* (1976) at 236 [8.5.65].

232 *Public Service Regulations (Amendment)* Statutory Rule No 137 of 1987, Explanatory Statement at 1.

233 *Public Service Regulations (Amendment)* (Cth) Statutory Rule No 137 of 1987.

statement of principles about the duties and conduct of officers"[234]. The Explanatory Statement said that reg 34 had "restricted officers from making public comment except in the discharge of their official duties", but that the sub-committee had recommended that the emphasis be changed from a restriction on public comment to the imposition of a duty on officers not to misuse official information gained in the course of employment[235]. Regulation 8A(i) provided for a new duty requiring that:

> "[a]n officer shall ... at all times behave in a manner that maintains or enhances the reputation of the Service".

174 It was against this background that the *Public Service Act* was enacted a little more than a decade later. The Explanatory Memorandum to the *Public Service Bill 1999* (Cth) explained that it was "intended to replace the current legislative framework for the establishment and management of the Australian Public Service"[236]. An element of the reform agenda was "modernising the APS legislative framework" by "a careful balance between devolved responsibility and improved accountability"[237]. The Code was included as part of the modernisation in the *Public Service Act*. It included, in s 13(11):

> "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."

175 While s 13(11) was modelled on reg 8A(i), it was wider than its predecessor[238] because APS employees, by their behaviour, were not merely required to uphold the reputation of the APS. APS employees were also required to uphold the APS Values and the integrity of the APS. In other words, rather than being only an outward facing test for behaviour that focused upon the reputation of the APS, the test was also inward facing with independent focus upon the APS Values and the integrity of the APS. However, the requirement to

---

234 *Public Service Regulations (Amendment)* Statutory Rule No 137 of 1987, Explanatory Statement at 1.

235 *Public Service Regulations (Amendment)* Statutory Rule No 137 of 1987, Explanatory Statement at 1.

236 Australia, House of Representatives, *Public Service Bill 1999*, Explanatory Memorandum at 1 [1].

237 Australia, House of Representatives, *Public Service Bill 1999*, Explanatory Memorandum at 1 [2].

238 Australia, House of Representatives, *Public Service Bill 1999*, Explanatory Memorandum at 25 [3.14.14].

"uphold" the APS Values was only a requirement not to act inconsistently with them. It contrasted with the obligation upon an Agency Head in s 12 of the *Public Service Act* to "uphold *and promote*" the APS Values (emphasis added).

176 The APS Value that is directly relevant to this appeal was contained in s 10(1)(a), which provided, as at 15 October 2012, that "the APS is apolitical, performing its functions in an impartial and professional manner". Two points must immediately be made about the impact of this "value" upon the general behaviour obligation in s 13(11).

177 First, although, like reg 8A(i), the behaviour obligation in s 13(11) was expressed to apply "at all times", the Explanatory Memorandum reiterated, consistently with the intention behind reg 8A, the "fundamental" point that "there should be no unnecessary concern with the private lives of staff members"[239]. It would be remarkable if, despite the remarks in the Explanatory Memorandum, and despite the intention to "modernise" the obligations of public servants by the statement of broad values, the sub-section had somehow reinstated the very principle of absolute prohibition that had been repealed in 1974 and that reg 8A(i) had rejected. Regulation 8A(i) had embraced the notion that, subject to express provision otherwise, a government employee should be free to exercise the civil and political rights, liberties and privileges generally enjoyed by citizens and should be able to make public comment. The Code did not generally depart from that notion.

178 Secondly, by adding the additional inward facing focus on the APS Values to the outward facing focus on "reputation" in reg 8A, s 13(11) extended the indirect constraint upon the content of public communication by public servants. However, although inward facing, the APS Value in s 10(1)(a) did not require that an employee be absolutely "apolitical". Section 13(11) was concerned with behaviour, not thought, and designed to minimise intrusion into private life. Moreover, the APS Value in s 10(1)(a) was only one of the APS Values, or inputs, giving content to the behaviour required by s 13(11). The extent to which the behaviour of the public servant required by s 13(11) should avoid being "politicised" will be affected by the reason that the value exists and will be informed by the other APS Values.

179 The reason for the existence of values of being apolitical, impartial, and professional is to enable a trusted relationship between, on the one hand, the public service and, on the other hand, Parliament, the executive government, which implements its statutes and policies, and the public, who are subject to the administration of those statutes. One of the main objects of the *Public Service*

---

239 Australia, House of Representatives, *Public Service Bill 1999*, Explanatory Memorandum at 26 [3.17.2].

Act is "to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public"[240]. This basis for the requirements of being apolitical, impartial and professional is also illustrated by the other APS Values, which at the time included that: the APS is "openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public"[241]; in implementing the Government's policies and programs, the APS provides the Government with "frank, honest, comprehensive, accurate and timely advice"[242]; the APS "delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public"[243]; and the APS "is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government"[244].

180 The degree to which the behaviour of a public servant should avoid being politicised will also be affected by other APS Values because s 13(11) requires consideration of all values relevant to the public servant's behaviour. The other APS Values include an emphasis on diversity, which is expressed in abstract terms that include recognising diversity of opinions: the APS "recognises and utilises the diversity of the Australian community it serves"[245] and the APS "is sensitive to the diversity of the Australian public"[246]. The APS Values also include values that "the APS provides a fair ... workplace"[247] and that the APS "has the highest ethical standards"[248]. The APS Values of fairness and ethics in the workplace are relevant to the s 13(11) behaviour obligation in relation to public comment by employees because the APS Commission and the Department of Immigration and Citizenship had themselves issued guidelines about such comment. It would, to say the least, strain the insistence upon the highest ethical

---

240 *Public Service Act*, s 3(a).

241 *Public Service Act*, s 10(1)(e).

242 *Public Service Act*, s 10(1)(f).

243 *Public Service Act*, s 10(1)(g).

244 *Public Service Act*, s 10(1)(n).

245 *Public Service Act*, s 10(1)(c).

246 *Public Service Act*, s 10(1)(g).

247 *Public Service Act*, s 10(1)(j).

248 *Public Service Act*, s 10(1)(d).

standards and a fair workplace if a public servant were sanctioned despite complying with APS guidelines.

181 As the Tribunal observed[249], the departmental guidelines and an APS Commission Circular[250] offered guidance to public servants concerning the use of social media. Both of them contained statements to the effect that public servants can make public comments in a private capacity and the further remark that[251]:

> "[i]t is quite acceptable for APS employees to take part in the political life of their communities. The APS Values stipulate that the APS is, among other things, 'apolitical, performing its functions in an impartial and professional manner', but this does not mean that APS employees must be apolitical in their private affairs. Rather, it means that employees should avoid behaving in a way that suggests they cannot act apolitically or impartially in their work."

182 Given this history and context, s 13(11), when read with s 10(1)(a) and the other APS Values, does not impose behavioural obligations that preclude a public servant from making political comment on social media. Rather, they support an interpretation of s 13(11) that creates a boundary, albeit ill-defined, between acceptable expression of political opinions and unacceptable expression of political opinions. Taking into account that a public servant is intended to be able to take part in their political community, that boundary will only be crossed when comments sufficiently imperil the trust between, on the one hand, the APS and, on the other, Parliament, the executive government, or the public. An assessment of when that trust will be sufficiently imperilled will depend upon all the circumstances.

183 Although all circumstances are relevant, there are six factors of particular significance to any assessment of whether the relevant trust is sufficiently imperilled: (i) the seniority of the public servant within the APS; (ii) whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities; (iii) the location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy

---

249 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [36], [37].

250 Australian Public Service Commission, Circular 2012/1: Revisions to the Commission's guidance on making public comment and participating online (social media) (2012).

251 See *Banerji and Comcare (Compensation)* [2018] AATA 892 at [37]; see also at [36].

discussion; (iv) whether the public servant intended, or could reasonably have foreseen, that the communication would be disseminated broadly; (v) whether the public servant intended, or could reasonably have foreseen, that the communication would be associated with the APS; and (vi) if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities.

184 In some cases, all six factors could point strongly towards a breach of s 13(11) by behaviour that imperils the trust protected by that sub-section, despite the communication being anonymous. An extreme example might be if a senior public servant makes an anonymous tweet to a large number of people where his identity is easily ascertainable and intended to be ascertained, and in the tweet he makes vituperative criticisms of government policy in his department and represents that he and others should aim to frustrate that government policy. This example is sufficient to reject Ms Banerji's submission that, on the proper interpretation of s 13(11), anonymous public communications can never lead to a contravention of s 13(11).

185 However, I do not accept the Attorney-General of the Commonwealth's submission that a public servant's attempt at anonymity could only be relevant, if at all, to determining the appropriate sanction. A hypothetical example, adapted from oral submissions, involving an intended private communication can be used as an analogy to illustrate why intended anonymity is a relevant matter in determining breach of s 13(11). Suppose that a public servant, even an extremely senior public servant such as a Departmental Secretary, expressed vitriolic but cogent criticism of government policy implemented by her department. The criticism is expressed privately to her spouse after work. She might be aware of a reasonable possibility that her spouse might subsequently tweet that criticism. And there might also be a possibility that members of the public would associate the criticism with the Departmental Secretary. But despite these possibilities, it is hardly conceivable that the private communication could have sufficient impact upon the APS Values to amount to a contravention of s 13(11). It is highly unlikely that unintended public repetition of the private comment, even if public repetition were known to be a reasonable possibility, could have a major impact upon any aspects of the trust that underlies the value in s 10(1)(a) concerning the apolitical, impartial and professional nature of the APS.

186 The intended anonymity of a public communication on social media can militate against the impairment of trust in the same way as the intended private nature of the communication, at least where anonymity is intended to avoid attribution to the APS and where the statement does not otherwise impair accountability. In other words, just as it is relevant that political comment that is later publicly attributed to a public servant was made privately, so too it can be relevant that political comment made in a more public forum was made anonymously so as not to be associated with the public service. To reiterate

though, anonymity is only one factor to be considered in the context of the APS Value in s 10(1)(a). The substance of the comment might be such as to imperil the relationships of trust even if there is only a remote possibility of it being generally attributed to the public servant or the public service. A comment might also require assessment of other APS Values such as the sensitivity of the APS "to the diversity of the Australian public"[252].

187 This analysis has concerned the interpretation of s 13(11) in light of the APS Values in s 10(1). However, as explained earlier, no issue arises on this appeal, and it is unnecessary to consider, whether the application of this interpretation to Ms Banerji's anonymous communications could support a conclusion that the decision to terminate her employment was not reasonable administrative action. It suffices to say that such an issue would require a close examination of all of the facts and circumstances. By itself, the fact that Ms Banerji sent more than 9,000 tweets[253] is neutral. It would be necessary to examine closely the content and all the circumstances of those tweets that were said to involve behaviour in breach of s 13(11)[254], singularly or in combination. The primary issue on this appeal is instead whether s 13(11), read with the APS Values including s 10(1)(a), and with s 15, is consistent with the implied freedom of political communication.

Are ss 13(11) and 15 consistent with the implied freedom of political communication?

188 Having performed the interpretation exercise, which is a pre-requisite to consideration of constitutional validity[255], it is possible to turn to an analysis of whether ss 13(11) and 15 are consistent with the implied freedom of political communication. That analysis requires consideration of structured proportionality in the manner broadly taken by a majority of this Court in *McCloy v New South Wales*[256], *Brown v Tasmania*[257], *Unions NSW v New South*

---

252 *Public Service Act*, s 10(1)(g).

253 *Banerji and Comcare (Compensation)* [2018] AATA 892 at [26].

254 Some of which were set out by the Tribunal: *Banerji and Comcare (Compensation)* [2018] AATA 892 at [9].

255 See the authorities referred to in *Brown v Tasmania* (2017) 261 CLR 328 at 479-480 [485]; [2017] HCA 43. See also *Clubb v Edwards* (2019) 93 ALJR 448 at 534 [411]; 366 ALR 1 at 106.

256 (2015) 257 CLR 178 at 194-195 [2]-[3]; [2015] HCA 34.

257 (2017) 261 CLR 328 at 368-369 [123]-[127], 416-417 [278].

Wales[258], and *Clubb v Edwards*[259]. Structured proportionality testing promotes transparent reasoning in the application of an abstract constitutional implication. It requires the court to confront directly the suitability, reasonable necessity, and adequacy in the balance of laws that impose a burden upon political communication.

189 A question that is anterior to the structured proportionality assessment is whether the purpose of ss 13(11) and 15 is legitimate[260]. The *Public Service Act* is a law in respect of the appointment and removal of all other officers of the executive government and the execution of that power[261]. The general objects of the *Public Service Act*, set out in s 3, include "to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public"[262].

190 The behavioural obligation in s 13(11), as affected by the APS Values, including s 10(1)(a), and as enforced through s 15(1), has that purpose. Ms Banerji correctly accepted that this is a legitimate purpose. As the Privy Council said in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[263]:

> "The preservation of the impartiality and neutrality of civil servants has long been recognised in democratic societies as of importance in the preservation of public confidence in the conduct of public affairs ... Along with these elements of neutrality and impartiality [of the public service] their Lordships would associate an element of loyalty, in particular to the minister whom the civil servant has been appointed to serve. The importance of these characteristics lies in the necessity of preserving public confidence in the conduct of public affairs. That is at least one justification for some restraint on the freedom of civil servants to

---

258 (2019) 93 ALJR 166 at 177 [42], 190 [110]; 363 ALR 1 at 13-14, 31; [2019] HCA 1.

259 (2019) 93 ALJR 448 at 462 [5]-[6], 506-507 [266], 544 [462]-[463]; 366 ALR 1 at 10, 70, 120-121.

260 See *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 200 [166]; 363 ALR 1 at 44-45.

261 *Constitution*, s 51(xxxvi) with ss 67 and 51(xxxix).

262 *Public Service Act*, s 3(a).

263 [1999] 1 AC 69 at 75-76.

participate in political matters and is properly to be regarded as an important element in the proper performance of their functions."

191 Contrary to Ms Banerji's submissions, ss 13(11) and 15 do not have the purpose, to use the words of Ms Banerji, of "cleansing APS employees of political opinions" or preventing them from expressing opinions "in ways that do not have a bearing upon the APS as an institution". As Ms Banerji submitted, those purposes would be illegitimate. They would involve a purpose, not merely a consequence or effect of pursuing some other aim, of silencing political communication[264].

(1) Suitability or rational connection of ss 13(11) and 15

192 Ms Banerji submitted that ss 13(11) and 15 lacked a rational connection to the legislative purpose of establishing an apolitical public service for a single reason. The reason was that anonymous comment has no connection with a person's status as an APS employee. Ms Banerji submitted that "[s]ingling out APS employees in the conduct of their private lives in this way lacks a rational explanation". One difficulty with this submission is that its focus is not upon rational connection. If the operation of a law purports to further its legitimate purpose by means that are more extreme than would rationally be expected, then this does not break the rational connection between the means adopted by the law and its purpose, although it might support a submission at the next stage that the burden imposed by the law was not reasonably necessary.

193 In any event, a further obstacle to the submission is that, as explained earlier, the proper interpretation of s 13(11) treats the anonymity of a public communication as a relevant factor to consider in the assessment of a public servant's behaviour for compliance with s 13(11).

(2) Reasonable necessity of the burden

194 The next question is whether there were alternative, reasonably practicable, means that would achieve the same object to the same extent but with a less restrictive effect on freedom of political communication. This requires consideration of whether another law presented an alternative that could reasonably have been expected, in an "obvious and compelling"[265] sense, to

---

264 See *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 201-203 [173]-[178]; 363 ALR 1 at 46-48.

265 *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 211 [58], 217 [81], 270 [258]; *Brown v Tasmania* (2017) 261 CLR 328 at 372 [139], 418 [282]; *Clubb v Edwards* (2019) 93 ALJR 448 at 462 [6], 507 [266]-[268], 510 [277], 548 [478]; 366 ALR 1 at 10, 70-71, 74, 126.

have (i) imposed a significantly lesser burden upon freedom of political communication, and (ii) achieved Parliament's purpose to the same or a similar extent[266]. The extent of the burden upon freedom of political communication can be assessed by reference to the "depth" and "width" of the burden[267].

195 The burden imposed by ss 13(11) and 15 is deep. Of its very nature, s 13(11) requires consideration of the APS Value of being apolitical and thus targets political communications. The burden is made deeper by the fact that the comments it targets are from the particular class of persons who are "uniquely qualified to comment"[268]. The nature and extent of the punishment or sanction for a breach is also relevant to the depth of the burden[269]. Here, the most serious consequence of a breach of s 13(11) is termination of employment under s 15(1). That sanction is civil, not criminal. And the scheme of s 15(1) is that it should only be imposed for behaviour that involves the most serious breaches of s 13(11). But that should not downplay the depth of the burden imposed by the potential sanction. A person's employment can be fundamental to him or her. The person's entire life might be built around it. The consequences of a loss of employment, particularly as a disciplinary penalty, could be catastrophic.

196 The burden imposed by ss 13(11) and 15 is also wide. The provisions burden political communication in the workplace as well as outside the workplace. They apply "at all times" and not merely in the course of APS employment. They affect thousands of people; in oral submissions reference was made to evidence that there are nearly a quarter of a million public servants in the APS. The provisions restrict public communications more than private communications, but the impact upon public communications is potentially very broad. The width is extended by the evaluative nature of the discretion as to (i) findings of breach of s 13(11) and (ii) the penalty to be imposed by the Agency Head as a consequence of the breach. The uncertainty arising from the evaluative nature of those discretions is not the result of vagueness in the meaning of s 13(11) or s 15. Such lack of clarity can be, and must be, resolved by judicial exegesis[270]. Instead, the uncertainty lies in the application of ss 13(11) and 15, as properly interpreted. That application leaves a wide discretion to the Agency Head.

---

266 *Clubb v Edwards* (2019) 93 ALJR 448 at 548 [479]; 366 ALR 1 at 126.

267 *Clubb v Edwards* (2019) 93 ALJR 448 at 548 [480]; 366 ALR 1 at 126.

268 *San Diego v Roe* (2004) 543 US 77 at 80.

269 *Clubb v Edwards* (2019) 93 ALJR 448 at 548 [480]; 366 ALR 1 at 126.

270 *Brown v Tasmania* (2017) 261 CLR 328 at 471 [452]-[453], 486-488 [506]-[508]; compare at 357 [78].

197 Although the burden is deep and wide, it is shallower and narrower than the burden that existed for the better part of a century, being the outright prohibition upon public political comment by public servants. For instance, the second factor in the evaluative consideration discussed above – whether the comment concerns matters for which the person has direct duties or responsibilities and how the comment might impact upon those duties or responsibilities – illustrates that there could be many matters upon which even senior public servants can express political opinions in public. As the Attorney-General for the State of Western Australia submitted, a health department official might make public comment about the defence department that would not contravene s 13(11) although it might have been a breach if it were a comment about the health department.

198 The breadth of a law's constraint upon freedom of political communication, particularly by a broad evaluative discretion, can be mitigated by mechanisms that permit review of any sanction[271]. It is mitigated in this case by various review mechanisms available to an employee who has been sanctioned under s 15(1) of the *Public Service Act*. Section 15(3) requires an Agency Head to establish procedures for determining whether an APS employee has committed any breach of the Code in s 13. Those procedures must have due regard for procedural fairness[272] and they may be different for different categories of APS employees[273]. For sanctions other than termination, an employee has a right of internal merits review under s 33 of the *Public Service Act*[274]. A termination of employment can be reviewed by the Fair Work Commission under the *Fair Work Act 2009* (Cth)[275]. If the dismissal meets various conditions, including that it was "harsh, unjust or unreasonable"[276], then reinstatement or compensation can be ordered for that unfair dismissal[277]. Termination could be unjust if the Fair Work Commission determined that the employee had not contravened s 13(11); it could be unreasonable if inferences were drawn by the Agency Head that could not reasonably have been drawn from the material before that person in any review or hearing; and it may be harsh if its personal and economic consequences

---

271 See *Wotton v Queensland* (2012) 246 CLR 1 at 16 [32]; [2012] HCA 2.

272 *Public Service Act*, s 15(3)(b).

273 *Public Service Act*, s 15(3)(c).

274 See also *Public Service Regulations 1999* (Cth), Div 5.3.

275 See *Public Service Act*, s 8(1); *Fair Work Act 2009* (Cth), s 394.

276 *Fair Work Act*, s 385(b); see also s 387.

277 *Fair Work Act*, s 390(1).

are disproportionate to the gravity of the misconduct upon which the Agency Head acted[278].

199 Despite the depth and breadth of the burden on political communication imposed by ss 13(11) and 15, Ms Banerji pointed only to one alternative law by which she submitted the Commonwealth Parliament might have expected to achieve its legitimate purpose to the same extent but with a lesser effect on the implied freedom of political communication. That law was said to be one that excluded anonymous communication from s 13(11). Ms Banerji thus submitted that the law would be more tailored if it restricted only public communication that identified the speaker as a public servant.

200 The terms in which such a hypothetical law might be expressed are unclear. This is an early indication that the law is not an obvious and compelling alternative that would impose a significantly lesser burden upon the freedom of political communication. When would a communication be sufficiently widespread to be "public"? When would a communication be anonymous? How many identifying features, short of a name or signature, would disqualify a communication from being anonymous? Would anonymous communications be carved out only from the APS Value in s 10(1)(a) or from other values as well?

201 More significantly, it is not obvious that a law which excludes anonymous communication, however that law might be expressed, would achieve Parliament's purpose to the same extent as, or a similar extent to, s 13(11). Rather, the natural expectation would be that an exception for anonymous communications, however defined, could substantially undermine Parliament's purpose of an apolitical public service. Political communications by public servants would be permissible, no matter how widespread the audience and no matter how corrosive of the trust underlying the APS as an institution, provided that the public servant is not identified or, on another variant of the law, not easily identifiable.

(3) Adequacy in the balance

202 The relevant object of the *Public Service Act* in s 3(a), to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public, is an object of great importance. It is part of the constitutional conception of responsible government. This notion of responsible government is reflected in the provisions of the *Constitution* creating power for the appointment and removal of civil servants, namely s 51(xxxvi) read with ss 67 and 51(xxxix), which empowered the enactment of the *Public Service Act*. Those civil servants are responsible to Ministers, whose

---

278 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465; [1995] HCA 24.

appointment is provided for in s 64 of the *Constitution*. Section 44(iv) of the *Constitution* reflects the importance of these civil servants remaining apolitical by making any person who holds any "office of profit under the Crown" incapable of being chosen or of sitting as a senator or a member of the House of Representatives. In *Sykes v Cleary*[279] this incapacity was held to extend to all public servants, namely all those persons who are permanently employed by the executive government. It extended in that case to Mr Cleary, who held an "office of profit" by reason of being a teacher who, although appointed by an independent statutory tribunal, was a permanent officer "employed by Her Majesty in the teaching service"[280].

203 The notion of an apolitical public service, which is one foundation of the constitutional scheme of responsible government, had a strong pre-Federation history. As Sir William Anson observed, the English provisions of the late nineteenth century requiring the disqualification of civil servants from election to the House of Commons were "for the most part imposed to secure the undivided attention of officials to the business of their departments, and the advantage of a permanent civil service unaffected by changes of ministry or by considerations of party politics"[281]. The English view, which developed from the *Report on the Organisation of the Permanent Civil Service*[282] in 1854, was rapidly adopted in 1856 by a Board in the colony of Victoria, which recommended the establishment of a permanent non-political public service, saying[283]:

> "It will be impossible to prevent confusion and public inconvenience, if the orderly working of the Civil Service is interrupted by frequent Ministerial changes. We therefore submit to your Excellency the propriety of following the English precedent, and of appointing non-political and permanent officers to carry into execution the policy which the Ministry of the day may originate."

---

279 (1992) 176 CLR 77 at 95-96; [1992] HCA 60. See also at 108, 130, 132; *Re Lambie* (2018) 92 ALJR 285 at 302-303 [78]-[79]; 351 ALR 559 at 582; [2018] HCA 6.

280 *Re Lambie* (2018) 92 ALJR 285 at 303 [79]; 351 ALR 559 at 582.

281 Anson, *The Law and Custom of the Constitution* (1886), pt 1 at 290. See *Re Lambie* (2018) 92 ALJR 285 at 300-301 [71]; 351 ALR 559 at 579.

282 Northcote and Trevelyan, *Report on the Organisation of the Permanent Civil Service* (1854).

283 Civil Service of the Colony of Victoria, *Report of the Board Appointed to Enquire into the Arrangements for the Better Organization of the Civil Service of the Colony* (1856) at 13.

The *Report on the Organisation of the Permanent Civil Service* was the foundation for legislation in the colony of Victoria in 1862 that established a permanent civil service[284]. Regulations made under the *Civil Service Act 1862* (Vic)[285] included the progenitor of the regulation made under the *Commonwealth Public Service Act 1902* (Cth)[286], which provided that public servants "are expressly forbidden to publicly discuss or in any way promote political movements". The Victorian progenitor provision, with sanctions including dismissal[287], contained a broad proscription including prohibiting civil servants from taking "any part in political affairs otherwise than by recording their votes for the election of members of parliament"[288].

204 This background is one reason why the *Public Service Act* is aptly described as serving "public and constitutional purposes as well as those of employment"[289]. As McHugh J said in *Mulholland v Australian Electoral Commission*[290], "[c]ommunications between the executive government and public servants and the people are as necessary to the effective working of those institutions as communications between the people and their elected representatives".

205 In *Australian Capital Television Pty Ltd v The Commonwealth*[291], Mason CJ described the "fundamental importance, indeed the essentiality, of freedom of communication, including freedom to criticize government action, in the system of modern representative government". That may be so, but it is also fundamentally important, and indeed essential, that in a system of modern representative government a parliament has freedom to make laws that implement the policy decisions it makes for the welfare of the governed. Where

---

284 *Civil Service Act 1862* (Vic).

285 *Regulations for the Civil Service of Victoria 1866* (Vic), reg 23 (*Victoria Government Gazette*, No 2, 8 January 1867 at 38).

286 *Regulations made under the provisions of the Commonwealth Public Service Act 1902* (Cth), reg 41.

287 *Regulations for the Civil Service of Victoria 1866* (Vic), reg 32.

288 *Regulations for the Civil Service of Victoria 1866* (Vic), reg 23.

289 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 180 [34]; [2008] HCA 53.

290 (2004) 220 CLR 181 at 219 [94]; [2004] HCA 41.

291 (1992) 177 CLR 106 at 140; [1992] HCA 45.

a law impairs freedom of political communication in a reasonably necessary manner in pursuit of another legitimate object, the law should only be held unconstitutional if there is such a gross imbalance between, on the one hand, the importance of that legitimate object to the parliament, and, on the other hand, the magnitude of the burden that the law places on the implied freedom of political communication, so as to pose a threat to the integrity of the constitutionally prescribed system of representative and responsible government[292].

206 Section 13(11), in light of the APS Values, including s 10(1)(a), and the sanctions in s 15(1), is far from exhibiting this lack of balance. Although the burden on the implied freedom of political communication is deep and vast, that burden is imposed in the pursuit, by reasonably necessary means, of a purpose of embedded and long-standing constitutional significance, an apolitical public service. The law is not inadequate in its balance.

The alternative submissions: disapplication and constraints on executive power

207 Each of Ms Banerji and the Attorney-General of the Commonwealth had submissions alternative to the challenge to constitutional validity of the legislative provisions. Ms Banerji submitted that the executive decision under s 15(1) to terminate her employment was vitiated because the decision maker did not take into account the implied freedom of political communication or because the decision itself contravened the implied freedom of political communication. The Attorney-General of the Commonwealth submitted that if any constitutional invalidity would otherwise arise then s 15(1) should be treated as authorising only an exercise of power consistent with constitutional limits.

208 Ms Banerji's alternative submissions should not be accepted. There is nothing in s 15 from which an implication could be made requiring a decision maker to take into account the implied freedom of political communication as a mandatory relevant consideration when making a decision under that section. If the operation of ss 13(11) and 15 would otherwise contravene the implied freedom of political communication then the implied freedom would not operate as a mandatory relevant consideration for the decision maker. Nor could the implied freedom operate directly upon an executive act to invalidate an executive decision that is authorised by legislation. It is necessary to explain why, contrary to Ms Banerji's submission, the implied freedom operates directly upon the legislation rather than upon the exercise of executive power that has its source in that legislation.

---

292 See *Clubb v Edwards* (2019) 93 ALJR 448 at 552 [496]-[497]; 366 ALR 1 at 130-131.

209 The Attorney-General of the Commonwealth submitted that if the generality of the terms of the statutory power in s 15(1) would otherwise permit action that would be contrary to the implied freedom of political communication then, despite the generality of the terms of the legislative provision, and despite an inability to ascribe a meaning to the words of the provision which would proscribe those exercises of power that are beyond constitutional limits, each exercise of executive power could be treated as subject to a statutory requirement that the power be exercised in accordance with constitutional limits. That submission is correct. The constitutional constraint does not operate directly upon the exercise of executive power. It invalidates the executive act only by operating upon the legislation, disapplying the legislative authority for the executive act if the legislation would otherwise trespass against the constitutional limits upon legislative power.

210 This was effectively the approach taken by Brennan J in dissent in *Miller v TCN Channel Nine Pty Ltd*[293] and by French CJ, Gummow, Hayne, Crennan and Bell JJ in *Wotton v Queensland*[294]. But it is also much older than that[295] and derives from a statutory mandate[296]. That mandate permits and requires an approach that constrains the manner in which the statute can be applied even if the statutory discretion is "not confined by statutory criteria"[297].

211 The disapplication of legislation from part of its sphere of operation in this manner has sometimes been described as "reading down" and sometimes described as "severance". However, as I explained in *Clubb v Edwards*[298], neither of these labels is apt. Although those labels are more familiar, the technique here, as in *Wotton v Queensland*[299], involves "[n]o question" of severance or reading down of the legislation. The best description is "disapplication", although the process could be described as part of an exercise of

---

293 (1986) 161 CLR 556 at 612-614; [1986] HCA 60. See also *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 522; [1952] HCA 17.

294 (2012) 246 CLR 1 at 14 [23].

295 See *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357; [1921] HCA 31.

296 Now contained generally in *Acts Interpretation Act 1901* (Cth), s 15A.

297 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613.

298 (2019) 93 ALJR 448 at 534-540 [415]-[433]; 366 ALR 1 at 107-114.

299 (2012) 246 CLR 1 at 14 [23].

"construction" only if that term is used, in contradistinction to "interpretation"[300], to describe the manner in which the essential meaning of legislation is applied to particular facts. As the Attorney-General of the Commonwealth observed, this approach of "construction" avoids the "element of conceptual confusion"[301] involved in treating the constitutional limit as a constraint upon executive power when a constitutional limit on power cannot "sensibly be described as a mandatory consideration" for the exercise of executive power[302].

Conclusion

212 Orders should be made as proposed in the joint judgment.

---

300 *Clubb v Edwards* (2019) 93 ALJR 448 at 537 [425]; 366 ALR 1 at 111.

301 *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 at 257 [56].

302 Walker and Hume, "Broadly Framed Powers and the Constitution", in Williams (ed), *Key Issues in Public Law* (2017) 144 at 157. Compare *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1); *Human Rights Act 2004* (ACT), s 40B(1)(b).