

The implications of *Comcare v Banerji* [2019] HCA 23 for the Public and Private Sectors

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Agenda

1. Legal Background
 - *Public Service Act 1999* (Cth)
 - Implied right to freedom of political communication
 - Out of hours conduct
2. Previous Commonwealth public sector cases
3. Factual background
4. Decision
5. Implications

Public Service Act 1999



'at all times behave in a way that upholds the APS Values and APS Employment Principles; and the integrity and good reputation of the employee's agency and the APS' – Section 13(11)

'The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence' – Section 10(5)

Public servants can be subject to disciplinary action up to and including termination of employment for breaching s13 of the Act

Implied right to freedom of political communication



- *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96
- *Coleman v Power* (2004) 220 CLR 1
- *McCloy v New South Wales* (2015) 257 CLR 178

Test:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
2. If so, is the burden reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.
 - a) Is the law suitable – does it have a rational connection to the purpose of the provision?
 - b) Is the law necessary – is there an obvious or compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom
 - c) Is it adequate in its balance – a value judgment, within the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

Out of hours conduct

- *Blyth Chemicals v Bushnell* (1933) 49 CLR 66
- *Rose v Telstra Corporation* [1998] AIRC 1592

Test:

1. Is there a sufficient connection between the out of hours conduct and the employment relationship?
2. Is there an 'actual repugnance between the individual's act and the employment relationship' (*Blyth Chemicals* [81-82]), or is the conduct of 'such gravity or importance that it indicated a rejection or repudiation of the employment contract' (*Rose* [1602]).

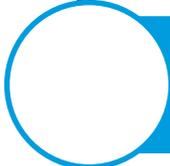
Public Service

- *McManus v Scott-Charlton* (1996) 70 FCR 16

Previous case law



Bennett v President, Human Rights and Equal Opportunity Commission (2003) 134 FCR 334

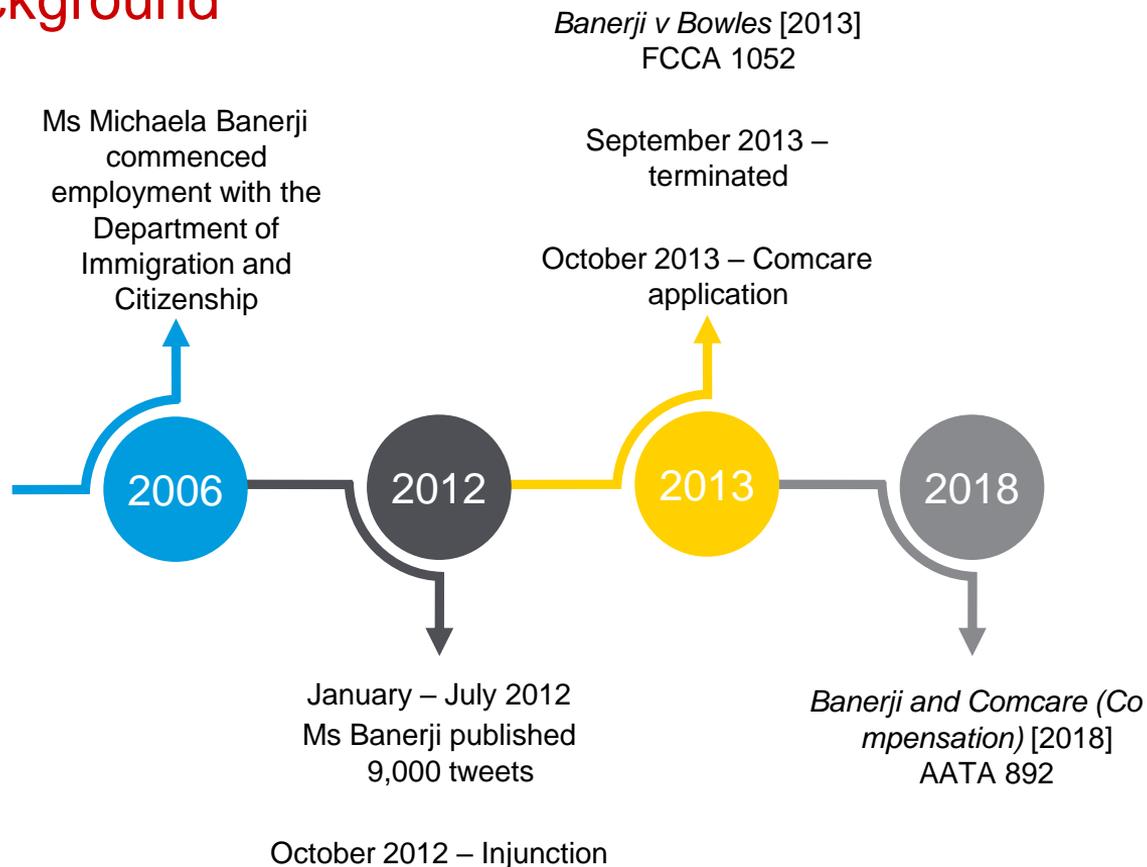


Starr v Department of Human Services [2013] FCA 1052



Chief of Defence Force v Gaynor (2017) 246 FCR 298

Factual Background



Banerji and Comcare (Compensation) [2018] AATA 892



- Section 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth)
- Was the decision to terminate Ms Banerji's employment reasonable administrative action taken in a reasonable manner if it breached the implied freedom of political communication?

Found:

- Termination of Ms Banerji 'trespassed on the implied freedom of political communication, was thus unlawful, and so cannot constitute reasonable administrative action.'
- An interest in an impartial public service which might justify restrictions is moot if the comments were anonymous and there was no connection between the comments and the public service.

Comcare v Banerji [2019] HCA 23



- Does the combination of sections 10 and 13(11) of the *Public Service Act 1999* (Cth) impose an unjustified burden on the implied freedom of political communication?
- Concessions
 - Comcare: Sections 10 and 13(11) do impose a burden on political communication
 - Banerji: the tweets breached sections 10 and 13(11) of the PS Act.

Found:

- The implied freedom of political communication is not a personal right of free speech, but a fetter on legislative and executive power
- Validity of legislation can be challenged on the basis that it has a 'material unjustified effect on political communication as a whole.' It is not a question of whether it has a material unjustified effect on one person or a narrow group of individuals
- Legislation will not impose an unjustified burden on the implied freedom of political communication if:
 - the impugned law is for a legitimate purpose consistent with the system of representative and responsible government; and
 - if so, whether that law is reasonably appropriate and adapted to the achievement of that objective.

Comcare v Banerji [2019] HCA 23



Found (continued):

- The requirement to at all times uphold the appearance of an apolitical and impartial APS does impinge on the implied freedom of political communication, but it is not an unjustified burden:
 - the maintenance and protection of an apolitical and professional public service is a significant purpose consistent with the system of representative and responsible government; and
 - the 'impugned provisions' are suitable for the achievement of that objective, there is no reasonable alternative for the achievement of that objective and the imposition on the implied freedom is balanced by the appeal and review avenues for any disciplinary action flowing from section 15 of the PS Act.
- Delegates exercising the discretion under s15 of the *Public Service Act 1999* are not required to take the implied freedom of political communication into account when determining what sanction to impose.

Implications



State and Territory public sector



- Obligation to act impartially and to uphold the reputation of the relevant public service.
 - *Government Sector Employment Act 2013* (NSW), s7(c);
 - *Public Administration Act 2004* (VIC), s7(c);
 - *Public Sector Act 2009* (SA), ss5(6) and 6;
 - *Public Sector Management Act 1994* (WA), s21(1) 'Commissioner's Instruction No. 7 Code of Ethics 2012';
 - *Public Sector Ethics Act 1994* (Qld), ss4(2), 6, 8;
 - *Public Sector Management Act 1994* (ACT), s9(d);
 - *State Service Act 2000* (Tas), ss7(a), 7(f) and s9(12)-(13);
 - *Public Sector Employment and Management Act 1993* (NT), s5F(1)(a)(i).

Tasmanian State Service



- State Service Principles
 - (s7(a)) the State Service is apolitical, performing its functions in an impartial, ethical and professional manner
 - (s7(f)) the State Service delivers services fairly and impartially to the community
- Code of Conduct
 - (s9(13)) 'an employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service principles'
 - (s9(14)) 'an employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service.'

Guidance for public sector employers



- Revisit guidelines on application of Codes of Conduct and Social Media Policies
- Is the conduct:
 - Bound to raise questions about the employee's capacity to work professionally, efficiently and impartially;
 - Likely to seriously disrupt the workplace; and / or
 - Calculated to damage the integrity and good reputation of the APS, or equivalent for State and Territory governments.
- When making an assessment of a public comment it is necessary to look at the content and all the circumstances of each comment, post, or tweet to determine whether it breaches impartiality singularly or in combination
- It is unlikely that comments made to friends and family in private will fall foul of the requirement to be apolitical and impartial.
- Not all public political comment by an government employee will breach Codes of Conduct, only public comment that might cause the public, or the legislative and executive branches of government to question the capacity of the employee to perform their role apolitically and impartially.

Guidance for public sector employers



- Relevant considerations:
 - the seniority of the public servant
 - 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
 - the location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy discussion
 - whether the public servant intended, or could reasonable have foreseen, that the communication would be disseminated broadly
 - whether the public servant intended, or could have reasonably foreseen, that the communication would be associated with the APS and
 - if so what the public servant expected, or could reasonably have expected an ordinary member of the public to concludes about the effect of the comment upon the public servant's duties or responsibilities.

Guidance for public sector employers



- The decision also emphasises that when making a determination about the imposition of a disciplinary the decision maker should:
 - act reasonably and impose a sanction that is proportionate to the nature and gravity of the breach
 - take into account the employee's personal circumstances; and,
 - act in accordance with the principles of procedural fairness.

Private employers & Folau

- Not relevant
- Apply test in *Rose v Telstra*

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