IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **No. C12 of 2018**

BETWEEN: **COMCARE**
Appellant

and

10 **MS MICHAELA BANERJI**
Respondent

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO APPEAR AS AMICUS CURIAE

PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

20 ## PART II: BASIS OF LEAVE TO APPEAR

2. The Australian Human Rights Commission (**AHRC**) seeks leave to appear as *amicus curiae* to make submissions in support of the Respondent (**Banerji**). The Court's power to grant leave derives from the inherent or implied jurisdiction given by Ch III of the Constitution and s 30 of the *Judiciary Act 1903* (Cth).

PART III: REASONS FOR LEAVE

3. Leave should be given to the AHRC for the following reasons.

4. *First*, the submissions advanced by the AHRC are not otherwise advanced by the parties. Without the submissions, the issues before the Court are otherwise unlikely to receive full or adequate treatment: cf *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at

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312-3. The Commission's submissions aim to assist the Court in a way that it may not otherwise be assisted: *Levy v State of Victoria* (1997) 189 CLR 579 at 604 (Brennan CJ).

5. *Secondly*, the proposed submissions are brief and limited in scope. The grant of leave to appear will not unduly burden the Court or the parties: *Levy v State of Victoria* (1997) 189 CLR 579 at 605 (Brennan CJ).

6. *Thirdly*, the AHRC's functions include "where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues": *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o) (**AHRC Act**). Relevant human rights include freedom of expression and the right to take part in the conduct of public affairs.[1] In seeking leave to appear as *amicus curiae*, the AHRC is endeavouring to perform this function. The performance of this statutory function by the AHRC is in the public interest.

PART IV: SUBMISSIONS

Introduction

7. The AHRC addresses submissions to the following topics.

   (a) ***First***, the operation of the implied freedom on the executive power to implement a statute. The AHRC submits that the "primary" approach of the Commonwealth Attorney-General in his submissions (**CS**) is erroneous. The exercise of a statutory discretion may be unlawful by reason of the implied freedom *either* because the statute conferring the power is invalid *or* because the particular exercise of power is incompatible with the implied freedom. The implied freedom operates directly on the power given by s 61 of the Constitution. That is additional to its operation on s 51. This submission furnishes a doctrinal basis for some of the submissions advanced by Ms Banerji.

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993), arts 19 and 25, which appear in Schedule 2 to the AHRC Act.

(b) ***Secondly***, the AHRC submits that political speech by public servants is particularly important. Burdens on political speech by public servants are less likely to be justified than other burdens on political speech.

(c) ***Thirdly***, the AHRC supplements the Commonwealth Attorney-General's description of the history of discipline within the Commonwealth public service. That history supports the multi-factorial approach advanced at CS [22], but also indicates that the anonymity of public comment may be an important factor in assessing whether s 13(11) of the *Public Service Act 1999* (Cth) has been infringed.

(d) ***Fourthly***, the AHRC submits that the Commonwealth Attorney-General's alternative approach – which relies upon statutes conferring discretions being construed so as only to authorise an exercise of power up to but not exceeding the limits of Commonwealth power – is wrong in principle. The question is always one of Parliament's intention, and in construing a statute the Court must give the statutory text a meaning it can reasonably bear. Sometimes, the only available conclusion will be that Parliament intended a discretion to bear a meaning which it cannot validly have.

(e) ***Fifthly***, the AHRC makes submissions on the practical application of the Commonwealth Attorney-General's secondary approach to statutory discretions. The AHRC submits that, on the secondary approach, the *character* of the burden on political communication is particularly significant.

8. These submissions are the submissions of the Commission and not of the Commonwealth Government.

The operation of the implied freedom on the executive power to implement a statute

9. The Commonwealth Attorney-General submits that, where the exercise of an administrative discretion is said to interfere with the freedom of political communication, the question is *only* whether the legislation is susceptible of exercise in accordance with the freedom: see CS [4]-[5]. If so, then the Commonwealth Attorney-General submits that individual exercises of power are not and cannot be incompatible with the freedom of political communication.

10. The AHRC submits that this approach is erroneous.

11. The approach is contrary to the fundamental principle that the implied freedom operates on *executive* power as well as legislative power. This has been affirmed by this Court on numerous occasions: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [20] (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1 at [90] (McHugh J), [195] (Gummow and Hayne JJ) (***Coleman v Power***); *Tajjour v State of NSW* (2014) 254 CLR 508 at [59], [103] (Hayne J), [195] (Keane J); *Kuczborski v Queensland* (2014) 254 CLR 51 at [216] (Crennan, Kiefel, Gageler and Keane JJ); *McCloy v State of New South Wales* (2015) 257 CLR 178 at [42] (French CJ, Kiefel, Bell and Keane JJ), [111], [114]-[115], [122], [125] (Gageler J), [317] (Gordon J).

12. As was said in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560, the implied freedom "preclude[s] the curtailment of the protected freedom by the exercise of legislative **or executive** power" (emphasis added). Accordingly, the implied freedom "gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws **or by the exercise of those powers**": *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 168 (Deane J).

13. In this respect, the implied freedom is distinct from those constitutional limitations, such as s 116, which only constrain "laws" which have been "made" by the Commonwealth. The implied freedom also has a preclusive operation distinct from that of s 109 since s 109 also operates on *laws*, not the exercise of powers under laws.

14. There are a number of reasons why the implied freedom operates on executive power as well as legislative power. The implied freedom abstracts from *all* powers given by the Constitution, not just the legislative power given in ss 51 and 52. The implied freedom is the "leading provision", so to speak, to which other powers must give way: see *Coleman v Power* at [90] (McHugh J). That is not just a textual observation. It is required by the structural and systemic imperatives which generate the freedom. The constitutionally-prescribed systems are just as apt to be impeded by executive power as legislative power.

15. The source of the power of the Executive Government of the Commonwealth to administer a statutory power is s 61 of the Constitution. It is an aspect of "the execution

and maintenance … of the laws of the Commonwealth": see *Williams v Commonwealth* (2012) 248 CLR 156 at [193] (Hayne J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [126] (French CJ); *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101 (Dixon J); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 230 (Williams J).

16. The exercise of sovereign power to administer a statute given by s 61 is distinct from that exercise of sovereign power constituted by the enactment of that statute in the first place.

17. It follows from the above that the inquiry called for by the implied freedom does not end once the statute is susceptible of exercise in accordance with the freedom. The implied freedom also operates *directly* on the exercise of s 61 executive power.

18. This conclusion is consistent with the reasoning in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [68], [137], [141], [217] and [220]-[221] where members of this Court applied an implied freedom analysis directly to a by-law, as distinct from the empowering statute.

19. Where the Executive Government exercises a statutory discretion, the exercise of power may be invalid because *either* the statute *or* the individual exercise of statutory power is precluded by the implied freedom. In the case of the individual exercise of statutory power, the relevant questions are the same as those applicable to statutes: in short, does the exercise of power effectively burden the freedom and, if so, is it proportionate to a compatible end?

20. The position may be different in respect of State public power. That is because one reason why the implied freedom binds the States is because of s 107 of the Constitution, which withdraws from *the Parliament* of a State power to enact laws inconsistent with the implied freedom: see *Coleman v Power* at [90] (McHugh J), [195] (Gummow and Hayne JJ). Accordingly, the observation in *Wotton v Queensland* (2012) 246 CLR 1 at [22] is distinguishable.

The importance of political communication by public servants

21. The statutory power at issue in this case, both in its legal and practical operation, burdens political communication by Commonwealth public servants. In ascertaining the compatibility of a law with the implied freedom, a relevant consideration is the character of the political communication which is being burdened. A burden on the speech of the leader of the Opposition is qualitatively different to other burdens. This is relevant at least once the Court comes to assessing whether the law is adequate in its balance.

22. It has long been recognised that there is a special value in political communication of public servants.

23. This is reflected in Commonwealth documents.

24. In early 1977, a number of Permanent Heads of Commonwealth Departments considered that there would be "considerable advantage in having all the rules and conventions governing ethical conduct in the Public Service drawn together in a single consolidated reference document".[2] The Government requested the Commonwealth Public Service Board to draw up a set of guidelines on official conduct for Commonwealth public servants. The first *Guidelines on Official Conduct of Commonwealth Public Servants* were published by the Board in 1979. In those Guidelines, the following was said (at 47 [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.

25. In the Commonwealth Public Service Board's *Guidelines on Official Conduct of Commonwealth Public Servants* (1987), the following was said (at 14 [6.2]):

> A democratic society places a high value on open and participative community involvement in political and social issues, and thus the Board recognises the right of public servants as members of the community to make public comment and enter into public debate on such issues. Reasoned public discussion on the factual technical

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[2] Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants*, Personnel Management Series No. 1, at iv.

> background to policies and administration can lead to better public understanding of the processes and objectives of government.

26. This has also been recognised in the jurisprudence.

27. For example, in *Pickering v Board of Education*, 391 US 563 (1968), the Supreme Court of the United States said (at 572):

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

28. Further, in *San Diego v Roe*, 543 US 77 (2004), the Supreme Court of the United States recognised that public servants were "uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large": at 80. The Supreme Court continued (at 82):

> Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

29. In *Lane v Franks,* 134 S. Ct. 2369 (2014), Sotomayor J (with whom Thomas, Scalia and Alito JJ concurred) said (at 2379):

> It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.

30. The special position of public servants is, in part, explained by the systemic basis of the freedom. The freedom derives, in part, from the system of responsible government. At the heart of Australia's system of responsible government is the accountability of the Executive Government to Parliament: see *Egan v Willis* (1998) 195 CLR 424 at [42] (Gaudron, Gummow and Hayne JJ). Ministers are responsible to Parliament, not only for their own conduct, but also that of their Departments: see *Williams v Commonwealth* (2012) 248 CLR 156 at [509] (Crennan J). Accordingly, the implied freedom protects disclosure of "information concerning the conduct of the executive branch of

government throughout the life of a federal Parliament": *Lange* at 561 (*per curiam*). In this context, the executive branch of government includes Ministers, the public service and the affairs of statutory authorities and public utilities: *Lange* at 561.

31. Public servants have a unique access and insight into the conduct and performance of the Executive Government and, in particular, that of their Departments. Political communication by public servants will often be crucial to the vitality and accountability of the system of responsible government. Public servants have expertise and experience the communication of which may be critical in holding the Executive Government to account.

10 32. Consistently with the above propositions, it has been held that "[c]ommunications between … public servants and the people are as necessary to the effective working of" the institutions of representative and responsible government "as communications between the people and their elected representatives": *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [94] (McHugh J). A burden on political speech by public servants to the people is as qualitatively significant as a burden on speech by elected representatives to the people.

The history of Commonwealth public service regulation

33. Some important matters should be added to the Commonwealth Attorney-General's summary of Commonwealth public service laws at CS [30]-[34].

20 34. The direct and immediate precursor to s 13(11)(b) of the *Public Service Act 1999* (Cth) (**the PS Act**) was r 8A of the *Public Service Regulations* (Cth).[3] That regulation stated:

> An officer shall:
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> …
>
> (i) at all times behave in a manner that maintains or enhances the reputation of the Service.

35. Regulation 8A was the subject of consideration in the *Report of the Public Service Act Review Group* (1994) (**the McLeod Report**). The McLeod Report recommended the

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[3] Inserted by *Public Service Regulations (Amendment) 1987* (Cth).

enactment of a new public service statute containing an APS code of conduct. The McLeod Report's recommended Code of Conduct was ultimately largely adopted in s 13 of the PS Act.

36. The proposed Code of Conduct referred to in the McLeod Report contained the following term (at 63-64 [5.9]):

> APS employees shall at all times in the course of their employment:
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> …
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> - behave in a manner that upholds the reputation and integrity of the APS.

37. The language was largely similar to that contained in r 8A save that "maintains or enhances" was replaced with the simpler term "upholds". The phrase "in the course of their employment" was not included in the PS Act. The likely reason for this appears in the Public Service Commission's *Report of the Public Service Act Review Group: Summary of Recommendations and Government Decisions* (August 1995) at 9. That report contains the government's response to the McLeod Report. In respect of the Code of Conduct, the government's view was (at 9):

> *Agree, but the code should not exclude behavior outside working hours which would bring the APS into disrepute.*

38. The authors of the McLeod Report observed that the predecessors to the proposed Code of Conduct included the *Guidelines on Official Conduct of Commonwealth Public Servants* published by the Commonwealth Public Service Board: see McLeod Report at 63 (fn 1) and [24]-[25] above. Those guidelines addressed the topic of public comment by public servants. They are evidence of what (if any) public comment by public servants Parliament considered to be inappropriate when it enacted s 13(11). The Guidelines in place at the time of the enactment of the PS Act[4] stated (at 34) that:

> There is, and there should be, little restriction on the majority of public servants making public comment. However, because of the nature of public service employment and the working relationship with the elected government, there are some circumstances in which it is not appropriate for public servants to make public comment.

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4 Which were promulgated in 1995.

39. The 1995 Guidelines set out in some detail (at 35) "situations which might render public comment improper". The following situations were identified:

- where a public servant, and particularly a senior public servant, is making public comment in a private capacity, but has not made this fact clear to the audience, who may be under the impression that the public servant is speaking on behalf of a department or the government;

- where a public servant is directly involved in advising on, directing the implementation of, or administering government policy, and the public comment could be seen as compromising his or her ability to continue to do so in an unbiased manner;

- where public comment, though it has little or no connection with a public servant's normal duties, is so harsh or extreme in its criticism of the government or its policies that it indicates that the public servant concerned is incapable or professionally, efficiently or impartially performing his or her official duties;

- where public comment amounting to strong criticism of departmental administration could cause serious disruption in the workplace. As noted elsewhere, public servants have a responsibility to contribute to harmonious working relationships. In keeping with this responsibility, public servants should attempt to resolve complaints about departmental administration internally. This may be done either by informal discussion with a supervisor, by using the grievance mechanisms, or by seeking advice or assistance from the union; and

- where public comments amount to gratuitous personal attacks.

40. A number of observations may be made about the Guidelines. First, the Guidelines contemplated that it was appropriate for public servants publicly to criticise the government of the day. The concern was not with criticism *per se*. The concern was with criticism which was strong, persistent and capable of being attributed to a public servant. Secondly, seniority was an important factor. Thirdly, an important – and arguably essential – factor was whether the speech was identifiable as being speech of a public servant. It is only where the speech is identifiable as speech of a public servant that it could lead to some public perception that the public servant will not perform his or her duties impartially.

41. These matters are, to an extent, reflected in the Commonwealth Attorney-General's multi-factorial analysis at CS [22]. However, what is omitted is the importance of identifiability of the speaker as a public servant.

The Commonwealth Attorney-General's approach to reading down and severance of broad discretions is erroneous

42. The Commonwealth Attorney-General submits that where a statutory discretion burdens the freedom, the discretion should always be construed, and can be construed, as "extending right up to, but not beyond, the limit of constitutional power, notwithstanding that the statutory text may appear to go further": see CS [50]. This approach is erroneous.

43. The submission advanced by the Commonwealth Attorney-General is as to the *construction* of statutory powers: cf *Clubb v Edwards & Anor* [2018] HCATrans 210 at 7378-7453. The task, being one of construction, involves the "attribution of meaning to statutory text": *Thiess v Collector of Customs* at [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). "The meaning given to the words must be a meaning which they can bear": *Momcilovic v R* (2011) 245 CLR 1 at [39] (French CJ). Further, in construing a statute, "the court cannot be left to select for itself the area in which the statute should be left to operate": *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61 (Brennan J). That involves the exercise of legislative power, not judicial power.

44. As this Court recently stated in *HFM043 v The Republic of Nauru* (2018) 92 ALJR 817 at [24] (Kiefel CJ, Gageler and Nettle JJ):

> The task of construction of a statute is of the words which the legislature has enacted. Any modified meaning must be consistent with the language in fact used by the legislature. The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it.

45. When construing a statute in light of constitutional constraints, the "test is one of intention": *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 370 (Dixon J) (***Bank Nationalisation Case***). The *Acts Interpretation Act* reading down and severance provisions are no "more than a guide" to that intention: *Bank Nationalisation Case* at 372 (Dixon J). Parliament's intention is to be discerned by reference to *all* the principles of construction, of which the presumption that laws bear a valid meaning is only one. Accordingly, the principle that statutes should be construed in a way that would result in validity applies "only so far as the language permits and only if there is no clear contrary intention that the statute is to operate in a way that must inevitably lead to invalidity": *Monis v R* (2013) 249 CLR 92 at [329] (Crennan, Kiefel and Bell JJ); see also at [334]. Accordingly, statutes have not been read down where, to do so, is contrary

to Parliament's intention manifested in[5] the objects of the provision,[6] statutory history[7] or statutory structure.[8] Put another way, the presumption that a statute was intended to bear a valid meaning must sometimes "yield to [a] contrary intention": *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [248] (Gummow, Crennan and Bell JJ). In ascertaining whether there is a contrary intention, the court should proceed from the principle that, ordinarily, Parliament does not intend its laws to bear a meaning "which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity": *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [41] (French CJ) (***IFTC***).[9] Where a law departs markedly from its ordinary meaning, the law is less accessible to the public, Parliament is less accountable to the electorate and there is a real risk that the statute will be administered according to its ordinary meaning: *IFTC* at [41] (French CJ). A toll is exacted on the rule of law when the meaning of a law departs markedly from its ordinary meaning: Cass R Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103 *Harvard Law Review* 405, 416.

46. The task of construction does not involve the severance of *operations* of a statute where that operation is thought to be contrary to the Constitution. This point was made by Latham CJ in *Pidoto v Victoria* (1943) 68 CLR 87 (***Pidoto***). In that case, it was argued that the statute should be treated as valid in relation to those cases which the Commonwealth could validly regulate. His Honour rejected that argument. His Honour said (at 109):

> When any person was charged with an offence under the statute the inquiry would be, not whether the statute in its general terms was within Commonwealth power, but whether such a statute could have been passed with some limitation or limitations which would have resulted in the statute being valid and applicable to the person who was on that particular occasion charged with an offence. If this question could be answered in the affirmative, it is said that the effect of the *Acts Interpretation Act* is that the statute must be held to be valid in its operation in relation to that person. It

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5 See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia* (2015) 256 CLR 569 at [82]-[90] (Gageler J) (dissenting) (***NAAJA***).

6 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 348-349 (Dawson J).

7 *Lane v Morrison* (2009) 239 CLR 230 at [19]-[20] (French CJ and Gummow J).

8 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339 (Brennan J), 372 (McHugh J).

9 See also *NAAJA* at [77] (Gageler J) (dissenting).

> would be left to the Court to discover an appropriate limitation as various cases presented themselves. … Such an application of the *Acts Interpretation Act* appears to me to require the Court to perform a feat which is in essence "legislative and not judicial".

47. The Commonwealth Attorney-General's approach is contrary to these principles. It involves reading the text of a statute conferring a broadly-framed discretion as if, by implication, it contained the words "unless the particular exercise of discretion would be contrary to the implied freedom". That approach attributes to the text a legal meaning which departs markedly from its ordinary meaning.

48. It also does not sit well with the accepted approach to implications. To imply a constraint in the face of broadly-expressed words does not sit well with the text. It is in the nature of repair and remedy, not construction.

49. The Attorney's approach assumes that, even once all textual and contextual factors are taken into account, Parliament must have intended that the discretion be valid up to the bounds of constitutional power. That attributes to Parliament an ultimate intention that its laws bear a meaning that is not readily apparent to administrators and citizens.

50. The Attorney's approach is contrary to the principle in *Pidoto*. It makes the question for the court whether "a statute could have been passed with some limitation or limitations which would have resulted in the statute being valid", with those limits to be discerned by reference to the circumstances of the particular case in which the discretion is impugned.

51. Further, the Attorney's approach does not give due weight to the principle stated by this Court in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [114] which is that the validity of a discretion is to be assessed "on the footing" that it "may, and at least commonly will, be applied according to [its] terms". A corollary of that principle is that even if a statutory discretion can be read down such that its *legal operation* extends up to the limits of Commonwealth power but no further, its *practical operation* will often extend far further. It can be inferred that the discretion will commonly be exercised in accordance with its *terms*, not in accordance with the implication relied on by the Attorney. Similarly, those seeking to comply with a broadly framed discretion are likely to regulate their conduct according to its ordinary meaning and not its legal meaning. In

both situations, the practical operation of the law is to chill political communication which is not proscribed in its legal operation.

52. This is not to say that a discretion which effectively burdens the freedom will be invalid because it cannot be read down. Rather, it is to say that there is no universal rule. Sometimes, the only available conclusion will be that Parliament intended a discretion to bear a meaning which it cannot validly have. In that case, the discretion will be invalid. On other occasions, the correct conclusion will be that Parliament intended the discretion to bear a meaning which takes it within, and not right up to, the bounds of permissible regulation. In each case, it is a question of what Parliament's intention is, which is to be determined by reference to *all* the principles of construction, not just the presumption that Parliament intends its statutes to bear a valid meaning. In discerning Parliament's intention, the Court is to have regard to those principles of construction which are well-known to the arms of government. Those include the presumptions, upon which much modern administrative law is based, that Parliament intends that statutory discretions be exercised for proper purposes (and not for improper purposes) and that they be exercised reasonably on the material before the decision-maker.

The Commonwealth's approach to assessing the validity of a particular exercise of power under a statute read "right up to, but not beyond, the limit of constitutional power"

53. At CS [55]-[58], the Commonwealth Attorney-General advances a general approach to assessing the validity of particular exercises of power under a statute where it has been read as authorising decisions up the limits of constitutional power.

54. The Attorney submits that the relevant inquiry is this: "if the statute were to authorise burdens on political communication of the nature and extent that arise from a particular administrative decision purportedly made under a statute, would that present as grossly disproportionate to or as otherwise going far beyond what can reasonably be justified in pursuit of the statutory purpose?" (see CS [56]). The Attorney submits that necessity analysis is redundant because (ex hypothesi) the statutory power has passed necessity testing: CS [53].

55. The AHRC makes two submissions on the Attorney's approach (if it is an available one).

56. *First*, when applying an implied freedom analysis to a particular exercise of executive power, the *character* or *nature* of the burden on political communication will typically loom larger in the analysis than the *extent* of the burden.

57. *Secondly*, necessity testing is not redundant when one is considering the validity of a particular exercise of power which has been read as operating up to the edges of validity. The Commonwealth's submission to the contrary seems to assume the correctness of his "primary" approach (as articulated at CS [8]) to a question which only arises if that primary approach has been rejected.

58. The correct approach is as follows. The relevant question is whether the particular exercise of power is proportionate or sufficiently tailored to a compatible end. If there is an obvious and compelling alternative administrative decision that is less burdensome of freedom of political communication, that may indicate that the particular exercise of power is invalid.

PART V: ORAL ARGUMENT

59. If the AHRC is given leave to make oral submissions, it estimates it will require 5 minutes.

Dated 12 December 2018

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