**SHORT PARTICULARS OF CASES**
**APPEALS**

**MARCH**

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No. Name of Matter Page No

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# SPENCE v STATE OF QUEENSLAND (B35/2018)

Amended special case filed: 24 January 2019

Date referred to the Full Court: 24 January 2019

The issue in this case is whether Queensland legislation, which prohibits the making of financial donations from property developers to political parties, is invalid.

The Plaintiff submits that Part 3 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) ("the Amending Act") is inconsistent with the implied constitutional freedoms of communication on government and political matters. Part 3 of the Amending Act restricts the funds available to political parties and candidates to meet the costs of political communications. The Plaintiff further submits that that part does not have a legitimate end, because there is nothing to show that donations to political parties, members or candidates for election to the Legislative Assembly of Queensland have had any effect on the integrity of Queensland's political processes.

The Plaintiff also claims that each of Parts 3 and 5 of the Amending Act are invalid insofar as they do not differentiate between donations for the election of members of the Legislative Assembly, the election of local councillors or the election of members to the Commonwealth Parliament. It further submits that the Commonwealth has exclusive power to regulate the election of members of Parliament and that the Amending Act undermines that power.

The Plaintiff further argues that each of Parts 3 and 5 are invalid under s 109 of the Constitution as being inconsistent with the *Commonwealth Electoral Act 1918* (Cth) ("CE Act").

Following the filing of Section 78B Notices, the Attorneys-General of the Commonwealth, New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Australian Capital Territory all filed a Notice of Intervention in this matter.

Upon the filing of an amended special case, Justice Gageler referred this matter to the Full Court for its consideration on 24 January 2019.

The questions of law stated for the consideration of the Full Court include:

- Are the amendments made to the *Electoral Act 1992* (Qld) by Part 3 of the Amending Act invalid (in whole or in part and, if in part, to what extent) because they impermissibly burden the implied freedom of political communications on governmental and political matters, contrary to the Commonwealth Constitution?

- Are the amendments made to the *Electoral Act 1992* (Qld) by Part 3 of the Amending Act invalid (in whole or in part and, if in part, to what extent) because they are beyond the power of the Parliament of Queensland to enact on the basis of an implied doctrine of intergovernmental immunities or on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?

- Is section 302CA of the CE Act invalid (in whole or in part and, if in part, to what extent) because it is beyond the Commonwealth's legislative power?

**COMCARE v BANERJI (C12/2018)**

Court removed from: Federal Court of Australia

Date of AAT judgment: 16 April 2018

Date cause removed: 12 September 2018

In this appeal the Appellant Comcare seeks to appeal from a decision of the Administrative Appeals Tribunal ("the Tribunal") which set aside a reviewable decision of Comcare to refuse the Respondent's claim for workers' compensation for post-traumatic stress disorder consequent upon the termination of her employment by the (then) Department of Immigration and Border Protection ("the Department").

The Respondent had been employed in the Australian Public Service ("APS") in the Department since May 2006. Between then and 19 July 2012 she posted over 9000 tweets on Twitter under the Twitter handle "*LaLegale".* That Twitter handle did not state her name but did include other identifying information. Following complaints by employees, a delegate of the Department carried out an investigation into whether the Respondent had breached the "the APS Code of Conduct" ("the Code") in s 13 of the *Public Service Act 1999* (Cth) ("the PS Act").

On 15 October 2012 the delegate determined that the Respondent had breached ss 13(1), (7) and (11) of the PS Act and that her employment should be terminated under s 15(1)(a) of the PS Act. The delegate found that the Respondent's tweets were "often highly critical of the Government, the Immigration portfolio and…[ ] her superior in the Department".

On 13 September 2013 the Respondent was provided with a Notice of Termination of employment. The covering letter from the Department notified her that the termination would take effect from close of business on 27 September 2013. It is common ground that as a consequence of being so informed, the Respondent suffered a "disease", effectively a post-traumatic stress disorder characterized by depression and anxiety, being an aggravation of an underlying psychological condition that was contributed to by her employment with the Commonwealth within the meaning of s 5B(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the SRC Act") ('the PTS disorder").

On 18 October 2013 the Respondent lodged a claim for workers' compensation under the SRC Act for the PTS disorder. The claim was refused on the basis that the termination was "reasonable administrative action" within the meaning of s 5A of the SRC Act. The decision was affirmed on internal review on 1 August 2014. The Respondent then appealed to the Tribunal.

The parties agreed that the only issue before the Tribunal was whether or not that decision involved a breach of the implied freedom of political communication.

The Tribunal considered the guidelines that the Public Service Commissioner and the Department had promulgated in assessing the extent to which, if any, the Respondent may have breached her obligations under the PS Act. Both sets of guidelines included guidance to departmental staff inter alia in relation to the "Use of social media", "Making public comment", and "Making public comment in

an un-official capacity". The Respondent contended that all her tweets were 'entirely anonymous', did not use departmental information, criticized both governments' refugee policies, did not involve the use of any departmental equipment (i.e. all tweets were from her own phone) and with possibly one exception, all tweets were carried out in her own time (i.e. not at work).

In order to determine whether ss 13(11) and 15 of the PS Act were compatible with the implied freedom of political communication the Tribunal was required to apply the two limbs of the test for validity of a law or executive action (the *Lange* test). Those are: *"First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government… if the first question is answered "yes" and the second is answered "no", the law is invalid".*

The Tribunal held that the answers in the circumstances of this case were "yes" and "no". Sections 13(11) and 15 of the PS Act "unacceptably trespassed on the implied freedom of political communication" and the termination of the Respondent's employment due to her alleged Code breaches was not 'reasonable administrative action taken in a reasonable manner' within the exclusion in s 5A(1) of SRC Act. The Tribunal set aside the reviewable decision. The consequence was that as the Respondent's PTS disorder was not excluded by s 5A(1), it was compensable under the SRC Act.

The Appellant appealed to the Federal Court of Australia on three questions of law. The Attorney-General of the Commonwealth intervened and applied to remove the cause pending in the Federal Court of Australia into the High Court of Australia under s 40(1) of the *Judiciary Act 1903* (Cth). The removal order was made on 12 September 2018.

The grounds of appeal in the High Court include:

(1) That the Tribunal erred in holding that ss 13(11) and 15 of the Public Service Act 1999 (Cth) were not reasonably appropriate and adapted to serve the legitimate purposes of maintaining an apolitical public service and maintaining public confidence in that service because, inter alia, the Tribunal:

- applied a distinction between "open " and "anonymous" comment not found in the statute;
- wrongly assessed the burden imposed by the sections by reference to administrative guidelines; and
- wrongly treated the implied freedom as an individual right rather than a limit on legislative power.

(2) That the Tribunal erred in the manner in which it approached the question whether the decision to terminate the respondent's employment was valid.

Notices of intervention under Section 78B of the *Judiciary Act 1903* (Cth) have been filed by the Commonwealth and the States of South Australia, Western Australia and New South Wales. Each of the Intervenors has filed submissions in support of the Appellant. The Human Rights Commission has also filed submissions seeking leave to intervene and to make submissions in support of the Respondent.

The Respondent has filed a Notice of Contention, in effect conceding that the Tribunal erred but submitting that that the decision of the Tribunal ought to be upheld upon other grounds.