

Comcare v Banerji [2019] HCA 23

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Facts

- Michaela Banerji worked for the Department of Immigration and Citizenship. She had an anonymous Twitter account named "@LaLegale". Banerji used that account to post 9,000 Tweets which were critical of the government and its policies.
- As set out in the *Public Service Act* ("**the Act**"), the Australian Public Service Code of Conduct ("**the Code**") requires APS employees to behave in a way that "*upholds the APS Values and the integrity and good reputation of the APS*" because the APS is "apolitical" and politically impartial.
- Banerji's identity under @LaLegale was uncovered and her employment was terminated for violating the Code.
- Banerji claimed compensation from Comcare under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) for injury resulting from the termination of her employment.
- A delegate of Comcare rejected the claim, and another delegate affirmed that determination, on the basis that the respondent's injury was suffered as a result of the termination. That decision was set aside by the Administrative Appeals Tribunal, on the basis that the Code trespassed upon Banerji's implied freedom of political communication.
- Comcare appealed.

Issues

- Does the Code violate the constitutional implied freedom of political communication?

Held

- The High Court unanimously held that the Code had a purpose consistent with the constitutionally prescribed system of representative and responsible government, specifically the maintenance of an apolitical public service.
- The Court held that the provisions of the Act and the Code were reasonably appropriate and adapted or proportionate to their purpose and did not unnecessarily infringe the implied freedom of political communication.
- Importantly, the Court reemphasised that the implied freedom of political communication is not a personal right of free speech. It is a restriction on legislative power.
- The freedom extends only as far as necessary to preserve and protect the system of representative and responsible government mandated by the Constitution.

Quotes

"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. 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.**"

(Kiefel CJ, Bell, Keane and Nettle JJ at paragraph [20])

Full Text

The full text is available here: <http://eresources.hcourt.gov.au/downloadPdf/2019/HCA/23>

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