HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
Sydney Registry

NSW Commissioner of Police
Appellant

Trevor Cottle
First Respondent

Industrial Relations Commission of New South Wales
Second Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

1. Does the Industrial Relations Commission of New South Wales (**IRC**) have the power to hear and determine an application for an unfair dismissal remedy pursuant to s 84 of the *Industrial Relations Act 1996* (NSW) (**IR Act**) filed by a police officer retired on medical grounds under s 72A of the *Police Act 1990* (NSW) (**Police Act**) (as it stood at 14 December 2016)?

2. What principles apply to resolve tensions between overlapping statutory schemes with a shared field of operation?

PART III: SECTION 78B

3. The Appellant considers no notice is required under s 78B of the *Judiciary Act 1903*.

PART IV: CITATIONS

4. New South Wales Court of Appeal: *Cottle v NSW Commissioner of Police* [2020] NSWCA 159; 298 IR 202 (**CA**).

5. Supreme Court of New South Wales (Simpson AJ): *NSW Commissioner of Police v Cottle* [2019] NSWSC 1588; 291 IR 215 (**PJ**).

6. Full Bench of the IRC: *Cottle v Commissioner of Police* [2018] NSWIRComm 1080; 284

IR 69.

7. First instance in the IRC (Murphy C): *Cottle v Commissioner of Police* [2017] NSWIRComm 1055.

PART V: FACTS

8. On 1 December 2016, the Appellant, the Commissioner of Police (**Commissioner**) made a decision under s 72A of the *Police Act* to retire the First Respondent (**Mr Cottle**), a non-executive police officer, on medical grounds as of 15 December 2016.

9. Mr Cottle sought review of this decision in the IRC. The Commissioner challenged the IRC's jurisdiction, arguing that – taking account of this Court's decision in *Commissioner of Police for NSW v Eaton* (2013) 252 CLR 1 (***Eaton***) – the IRC had no jurisdiction to entertain an unfair dismissal claim under Pt 6 of Ch 2 of the *IR Act* made by a police officer retired on medical grounds under s 72A.

10. At first instance, the Commissioner succeeded in this argument before Commissioner Murphy of the IRC, but that decision was overturned by the Full Bench of the IRC. The Commissioner then succeeded in an application for judicial review before Simpson AJ in the Supreme Court of New South Wales. Mr Cottle sought leave to appeal. The Police Association of NSW (**Police Association**) also sought leave to appeal, even though it had had no previous involvement in the matter. The Court of Appeal refused the Police Association leave to appeal, but permitted it to "intervene" in Mr Cottle's matter (though no formal order to that effect was made): CA [19]. The Court granted Mr Cottle leave to appeal, and upheld his appeal. Bell P gave judgment for the Court.

PART VI: ARGUMENT

11. The Commissioner submits that the Court of Appeal erred in its construction of the *Police Act* and the *IR Act*. The original IRC decision, and that of Simpson AJ, were correct.

12. These submissions address the following issues in turn:

    (a) The *IR Act*;

    (b) The statutory scheme in the *Police Act*;

(c) Relevant principles of construction for overlapping statutes;

(d) The Court of Appeal's erroneous approach to statutory construction;

(e) Application of principles;

(f) Sections 85 and 218 of the *Police Act*.

The IR Act

13. The relevant aspects of the statutory scheme in the *IR Act* dealing with unfair dismissals are summarised at CA [26]-[30]. The *IR Act* is a general statute conferring the IRC's functions concern regulation of employment conditions of employers and employees and resolving industrial disputes.[1] Its jurisdiction is limited chiefly to the NSW public sector employees (including law enforcement officers) and NSW local government employees.[2]

14. In that regard, at common law police officers are not engaged as employees under a contract of employment but are independent office-holders exercising original authority under statute and common law in the execution of their duties.[3] The *Police Act* does not displace the common law position in relation to non-executive police officers.[4] However, the *IR Act* extends its operation to the dismissal of "public sector employees" (*IR Act*, s 83(1)), and this is defined to include a member of the NSW Police Force (*IR Act*, Dictionary). Members of the NSW Police Force include police officers: *Police Act*, s 5(c). The Commissioner is deemed the employer for the purposes of any proceedings relating to a non-executive police officer held before a competent tribunal with jurisdiction to deal with industrial matters: *Police Act*, s 85.

15. Mr Cottle's application to the IRC was filed under s 84 of the *IR Act*. That section is found within Ch 2 Pt 6 of the *IR Act*, which Part is headed "Unfair dismissals". In the context of

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[1] *IR Act*, ss 3 and 146.

[2] *IR Act*, s 9B(1); note *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW), s 6.

[3] *Enever v The Queen* (1906) 3 CLR 969 at 982; *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113 at 122 and 129 (PC); *Sheikh v Chief Constable of Greater Manchester Police* [1990] 1 QB 637 at 643.

[4] *State of New South Wales v Briggs* [2016] NSWCA 344; 264 IR 309 at [50]–[63].

unfair dismissal proceedings, the IRC's role is to ensure that there has been a "fair go all around" by determining whether an employee's dismissal is "harsh, unjust or unreasonable".[5] The statutory scheme in Ch 2, Pt 6 of the *IR Act* governing unfair dismissal claims sets out the matters that the IRC may take into account in determining a claim, if considered appropriate (*IR Act*, s 88). It brings in a wide range of relevant matters, including the personal circumstances of parties.[6]

The statutory scheme in the *Police Act*

16. The NSW Police Force, established by s 4 of the *Police Act*, is a disciplined force of the Crown.[7] A feature of the relationship between the Commissioner and members of the NSW Police Force is the hierarchical command structure where lawful orders made by a superior officer must be obeyed.[8] The Commissioner has the responsibility to manage and control this disciplined force, subject to the direction of the Minister: s 8.

17. The functions of the NSW Police Force include providing police services, such as preventing and detecting crime; protecting persons from injury or death, and property from damage, whether arising from criminal acts or in any other way; and the provision of essential services in emergencies: s 6. Section 7 sets out a statement of values of members of the NSW Police Force, which reinforces the important nature of these functions including their role in upholding the rule of law and preserving the rights and freedoms of individuals. It is a cardinal requirement of policing that police officers behave with integrity in the performance of their functions.[9]

18. As those sections illustrate, police officers have an important and distinct role in the community. They are given special powers. They are entrusted with the use of weapons

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[5] *Re Loty and Holloway and the Australian Workers Union* [1971] AR (NSW) 95.

[6] See *Murray Irrigation Ltd v Balsdon* (2006) 67 NSWLR 73, [36]-[37].

[7] See *Enever v The King* (1906) 3 CLR 969 at 982; *Fletcher v Nott* (1938) 60 CLR 55 at 77; *New South Wales v Perpetual Trustee Company Limited* (1956) 92 CLR 113 at 120-12; *Attorney-General (NSW) v Perpetual Trustee Company Limited* (1952) 85 CLR 237 at 254-255; 53; *Police Service Board v Morris* (1985) 156 CLR 397 at 412; *Alexander v Commissioner of Police* [2009] NSWIRComm 3 at [46]-[47]; *Reid-Frost and Commissioner of Police (No 2)* [2010] NSWIRComm 86 at [23]-[27]; PJ [23].

[8] Failure to do so is an offence: *Police Act*, s 201.

[9] As is reflected in ss 7, 71, 82G.

not otherwise available to members of the general public.[10] They may commonly be exposed to traumatic events, violence and provocation in the course of duty, whether in, for example, investigating criminal activity, attending motor accidents, or dealing in the streets with provocative intoxicated young people or people afflicted with mental illness.

19. As is developed below, there is good reason to infer that Parliament considered that the Commissioner, and those in the chain of command, are best placed to determine whether a police officer is physically and mentally fit and capable of performing the special duties of policing in the extreme circumstances which might be faced by a police officer.

20. Section 72(1) of the Act deals exhaustively with the different circumstances that will result in a non-executive police officer's position becoming vacant. Relevantly, s 72(1)(c) provides that a police officer's position becomes vacant where that officer "is removed from office, or retires or is retired from office" under the *Police Act* or any other Act. Section 72 does not itself confer a power to bring about the vacation of the officer's position but, rather, makes clear the consequence of the exercise of a power found elsewhere in the *Police Act*.

21. As noted at PJ (64), the Commissioner has three powers to remove non-executive police officers:

(a) dismissal of probationary constables under s 80(3);

(b) removal of a police officer pursuant to s 181D in Pt 9 Div 1B, on the basis that the Commissioner does not have confidence in the person's suitability to continue as a police officer, having regard to their competence, integrity, performance or conduct;

(c) medical discharge under s 72A (as in force at the relevant time; it has since been replaced by s 94B, which is in materially the same terms).

22. This case concerns whether the IRC has an unfair dismissal jurisdiction to review the third possibility. Section 72A (as it stood at the time) provided as follows:

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[10] *Weapons Prohibition Act 1998* (NSW), s 6(2).

If:

(a) a non-executive police officer is found on medical grounds to be unfit to discharge or incapable of discharging the duties of the officer's position, and

(b) the officer's unfitness or incapacity:

i. appears likely to be of a permanent nature, and

ii. has not arisen from actual misconduct on the part of the officer, or from causes within the officer's control,

the Commissioner may cause the officer to be retired.

23. Once the preconditions in s 72A of the *Police Act* are met, the Commissioner has a discretion to exercise the power.

24. As regards the other two possible modes of dismissal, in relation to the first a majority of this Court held in *Eaton* that the IRC had no unfair dismissal jurisdiction to review dismissals under s 80(3).

25. As for the second (removal under s 181D), review by the IRC is specifically authorised, subject to certain distinctive provisions, pursuant to Pt 9 Div 1C and Div 1D of the *Police Act*. The role of the IRC in that regard is delineated with some care, and is markedly different from the manner in which the IRC generally conducts unfair dismissal proceedings pursuant to Ch 2, Pt 6 of the IR Act. Notably, under s 181F(1) of the *Police Act*, the IRC must proceed in its review of the removal of a police officer in a particular manner: it must consider the Commissioner's reasons for removing the applicant; then consider the case presented by the applicant as to why the removal is harsh, unjust or unreasonable; and then consider the case presented by the Commissioner in response. The applicant has the burden of proof at all time: s 181F(2). The IRC must have regard to the interests of the applicant and the public interest in conducting the review – including the interest of maintaining the integrity of the NSW Police Force, and (unusually for such review) the very fact that the Commissioner made the order pursuant to s 181D(1): s 181F(3). That provision illustrates the significance that the scheme attaches to the Commissioner's evaluation of the relevant matters.

26. In contrast, as regards the conduct of a general unfair dismissal hearing by the IRC for an application pursuant to Ch 2 Pt 6 of the IR Act, s 162 of the *IR Act* provides that the IRC

may determine its own procedure, while s 163 provides the IRC with the discretion to not act in a formal manner and ensures the IRC is not bound to comply with the rules of evidence. Unlike the precision of s 181F, s 88 of the *IR Act* prescribes a variety of matters that the IRC may take into account, including "such other matters as the Commission considers relevant". As Heydon J described it in *Eaton* at [24], "[the IRC's] role … is 'very free flowing'".

27. Further, s 181G of the *Police Act* also provides that certain provisions of Ch 2 Pt 6 of the *IR Act* are picked up, expressly modified and applied to the IRC's review of a decision to remove a police officer. These modifications include:

(a) reducing the time in which applications are to be filed from 21 days to 14 days;

(b) removing the discretion of the IRC to accept applications out of time;

(c) removing the reference to a threat of dismissal in s 89(7), essentially removing the jurisdiction of the IRC to grant injunctive relief of the kind contemplated by Schmidt J in *Hill v Director-General of Education* (1998) 85 IR 201; and

(d) limiting the IRC's discretion around the acceptance of any new evidence to the circumstances set out in s 181G(2) of the *Police Act*.

28. Section 181H of the *Police Act* states that neither the Commissioner, nor the members of the Commissioner's Advisory Panel, are compellable to give evidence in the review proceedings without the leave of the IRC. No such restriction on the compellability of witnesses exists under the *IR Act*.

29. It should be noted that there is some potential overlap between removal under s 181D (and thus the potential for IRC review under Pt 9 Div 1C and Div 1D) and a medical discharge under s 72A, insofar as the Commissioner's loss of confidence in the police officer's suitability to continue as a police officer relates to their "performance or conduct", where that might be affected by issues of physical or mental health. Thus it is possible that the detailed provision made in Pt 9 of the *Police Act* may apply to some instances of medical discharge where the Commissioner decides to proceed by that route.

Relevant principles of construction for overlapping statutes

30. This intersection between the *Police Act* and the *IR Act* requires understanding the principles of statutory construction where two statutory schemes are overlapping in relation to a shared field of operation.

31. The starting point is a presumption that the legislature does not intend to make contradictory legislation and intends that the provisions in a statute, and in different statutes of the same legislature, operate in harmony.[11] But, as with all matters of statutory construction, "the question as to the operation of the statutes remains a matter to be gleaned by reference to legislative intention. That intention is to be extracted 'from all available indications'".[12]

10 32. The issue requires close consideration of the provisions in question.[13] Legislation may indicate expressly which provisions prevail and which are subordinate. If the express words do not establish a hierarchy, then it is necessary to ascertain the legislative intention from all available indications.

33. An implied hierarchy may be derived by giving primacy to the specific provisions over the general provisions.[14] It "is but common sense that Parliament having before it two apparently conflicting sections at the same time cannot have intended the general provision to have deprived the specific provision of effect".[15] That is so as "[w]here any conflict arise with the general words of another provision, the very generality of the words of which indicates that the legislature is not able to identify or even anticipate every circumstance in
20 which it may apply, the legislature is taken not to have intended to impinge upon its own

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[11] *Eaton* at [78]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69]-[70]; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, [28]; *Kennon v Spry* (2008) 238 CLR 366, [90]; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [4], [18] (Gleeson CJ) [108]-[109] (Gummow and Hayne JJ); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [146] (Edelman J).

[12] To quote the plurality in *Eaton* at [46], citation omitted; see also at [43] and [78].

[13] *Ferdinands v Commissioner of Public Employment* (2006) 225 CLR 130 at 143 (Gummow and Hayne JJ).

[14] *Goodwin v Phillips* (1908) 7 CLR 1 at 14; *Bank Officials' Association (SA Branch) v Savings Bank of South Australia* (1923) 32 CLR 276 at 282 (Knox CJ); at 299 (Higgins J); *Anthony Horden & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1; *Deputy Commissioner of Taxation v Dick* (2007) 242 ALR 152 at 175 (Santow J).

[15] *Smith v The Queen* (1994) 181 CLR 338 at 348 (Mason CJ, Dawson, Gaudron and McHugh JJ); see also *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at [24].

comprehensive regime of a special character".[16] It is presumed that the Parliament must have intended to deal with the circumstances of the special case and a general enactment is presumed not to contradict or derogate from it.[17]

34. Both laws in question here have been subject to many amendments over many years in a rather piecemeal fashion. For such laws, it is necessary to construe them as whole as they stand at the relevant time, "as a combined statement of the will of the legislature".[18] Obviously, the difficulties in construction are greater where two overlapping statutes are involved with a shared field of operation.

The Court of Appeal's erroneous approach to statutory construction

10 35. The Court of Appeal began its analysis by identifying that s 85 of the *Police Act* contemplates proceedings relating to a non-executive police officer being held before the IRC and therefore "the IR Act in terms applies to non-executive police officers": CA [60]-[67]. The Court concluded that no inconsistency existed with the *Police Act* and the *IR Act* as it would mean "that the important statutory right conferred on public sector employees by s 84 of [the IR] Act should yield to the provisions of the *Police Act*, especially when, subject only to the limited scope for judicial review, a far-reaching decision made under s 72A of the *Police Act* is not subject to any other review process under that or any other Act": CA [70].

36. Although the Court of Appeal did not expressly identify the principle of statutory
20 interpretation applied, its approach resembles the application of the presumption about courts identified in *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc*, as though that should apply to a tribunal such as the IRC: namely, "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words".[19] Yet the principles lying

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[16] *Ombudsman v Laughton* (2005) 64 NSWLR 114, [19] (Spigelman CJ).

[17] *Maybury v Plowman* (1913) 16 CLR 468 at 473-474 (Barton ACJ); *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation (No. 2)* (1980) 29 ALR 333 at 347 (Deane J); *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at [85] (Nettle and Gordon JJ).

[18] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [25].

[19] (1994) 181 CLR 404 at 423; note further *Shergold v Tanner* (2002) 209 CLR 126 at [34].

behind that statement with regards to courts of law of general or wide jurisdiction are not apposite to be applied to statutory tribunals, which are myriad and diverse in nature, and which are the recipient of whatever specific jurisdiction, powers and functions are granted to them by statute. No presumption of breadth should be applied.

37. In its approach, the Court of Appeal erred by giving presumptive primacy to the *IR Act* over the *Police Act*. Even the *Shin Kobe* principle does not mean that the express words are to be given the broadest possible construction, regardless of all considerations of context, purpose or consequences.[20]

38. The Court of Appeal sought to identify indicators of legislative intention that clearly and unmistakably rebutted a presumption that the IRC had jurisdiction. But in the context of two overlapping statutory schemes with a shared field of operation, the correct starting point is a presumption that the legislature does not intend to make contradictory legislation and intends that the provisions in a statute, and in different statutes of the same legislature, operate in harmony. The Court of Appeal indicated that the Court's task was to construe the two Acts "by reference to established principles of statutory interpretation; it is not to construe the majority's decision in *Eaton*" (CA [58]). It erred by not recognising that a patchwork of overlapping statutes which have regularly been amended in piecemeal fashion may not be wholly consistent;[21] hence the significance of seeking to glean the legislative intention "from all available indications" (*Eaton*, [46]).

39. In *Eaton*, the Court found that a probationary police officer dismissed under s 80(3) of the *Police Act* did not have the right to make an unfair dismissal claim under Pt 6 of Ch 2 of the *IR Act* based on a consideration of all the relevant indicators to conclude that the *Police Act* comprised a comprehensive and intelligible statutory scheme in dealing with the dismissal of probationary police officers.[22] As *Eaton* addressed the interaction between the *IR Act* and the *Police Act* in relation to unfair dismissal claims under Pt 6 of Ch 2 of the *IR*

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[20] *ABCC v CFMEU* (2018) 262 CLR 157 at [103]; *Community Housing Limited v Clarence Valley Council* (2015) 90 NSWLR 292 at [34].

[21] Note eg *Western Australian Planning Commission v Southregal Pty Ltd* (2017) 259 CLR 106 at [44]-[55]; *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250 at [104]-[110].

[22] *Eaton* at [26]–[30] per Heydon JJ, and at [68]–[71] and [76]–[78] per Crennan, Kiefel and Bell JJ.

Act, the decision has sharp relevance to this case.

40. The Court of Appeal also made no reference to *Ferdinands v Commissioner for Public Employment* (**Ferdinands**).[23] That case, like *Eaton*, recognised the special nature of the functions exercised by the police officers and the special mechanisms provided for the review of employment decisions. In *Ferdinands* this Court held that, as the *Police Act 1998* (SA) (**SA Police Act**) dealt exhaustively with the dismissal of police officers, it thereby impliedly repealed the earlier *Industrial and Employee Relations Act 1994* (SA). Gleeson CJ found that the SA *Police Act* gave the appearance of exhaustiveness because it provided for an elaborate system of merits review of employment decisions relating to transfer, promotion, termination on certain grounds, and discipline but reserved to the Commissioner the power to decide whether the appointment of a member of the police force should be terminated following a conviction. In discerning the rationale for this specific attenuated regime, Gleeson CJ placed weight on the disciplined nature of the police force and the Commissioner's responsibilities of control and management, and the range of information and considerations that would need to be taken into account in deciding whether to retain a police officer (at [10]-[11]).

41. Likewise Gummow and Hayne JJ found that the SA *Police Act* represented a comprehensive statement of (a) the powers of the Commissioner to terminate the appointment of a member of SA Police; (b) the matters that are to be taken into account in exercising those powers; (c) the kinds of termination decision that are to be subject to review apart from the general processes of judicial review; and (d) the ways in which those termination decisions that are amenable to review are to be reviewed (at [57]). This comprehensive statement had a negative force in forbidding unfair dismissal claims under the SA industrial relations legislation.

Application of construction principles

42. In spite of its apparent relevance, the Court of Appeal's statement at CA [59] that *Eaton* "is not … the first port of call" signalled its approach to distinguish or disregard the approach

[23] (2006) 225 CLR 130.

in *Eaton* on the basis that the terms of s 80(3) are different to s 72A of the *Police Act*: see CA [67]-[69] and [79]. The self-evident differences in the language between the two provisions may be accepted. However, contrary to the Court of Appeal's approach, the decisions in *Eaton* and *Ferdinands* have clear and direct application to the present case. In concluding that the unfair dismissal laws did not apply to police officers, this Court placed emphasis on the following matters:[24]

(a) the nature of the police force as a hierarchical disciplined force of the Crown which required police officers to obey the commands of superior officers;

(b) the special functions exercised by police officers in law enforcement and community protection, and the intrusive and coercive nature of the powers to fulfil their functions, placed police officers in a different position to public sector employees;

(c) the Commissioner had been given sole responsibility for ensuring the effective and efficient management of the police force in performing these functions;

(d) in light of the exceptional nature of policing and its importance to community wellbeing, Parliament had enacted legislation establishing elaborate and bespoke procedures for dealing with and reviewing the decisions concerning the appointment, discipline, management and removal of police officers, including the kind of considerations to be taken into account in making these decisions, and the kinds of decisions that are and are not the subject of a merits review;

(e) the police legislation enacted a coherent statutory scheme in dealing with police officers and, in the case of *Ferdinands*, the SA *Police Act* also appeared to be exhaustive in nature; and

(f) in contrast to police legislation, the general industrial relations legislation is aimed at a broad class of employees, and a broader range of considerations applicable to the wider community, and was inapt to apply to the special circumstances of police.

[24] *Ferdinands* at [10]-[11] (Gleeson CJ); at [50]-[57] (Gummow and Hayne JJ); at [158] (Callinan J); *Eaton* at [11]-[31] (Heydon J); at [73]-[79] (Crennan, Kiefel and Bell JJ).

43. Those considerations apply equally to the issue at hand here. The statutory scheme contained in the *Police Act* contains a particular scheme with respect to the appointment, conduct, discipline and removal of police officers that is not apt to be addressed under general industrial relations legislation. In dealing with these matters comprehensively, the *Police Act* manifests an intention that to the extent review of decisions by the Commissioner to dismiss police officers is intended, it is dealt with expressly. The following textual, contextual and purposive points are relevant in that regard.

44. First, Parliament has turned its mind to providing specific jurisdiction to the IRC in Pt 9 Divs 1B and 1C of the *Police Act* in regards to the discipline and removal of police officers that is different to, and less beneficial to an officer than, the general system of review for unfair dismissal under the *IR Act*. The point is also reinforced by the specific provisions in Pt 9 Div 1A made for IRC review of decisions (which do not amount to removal) made under s 173 in Pt 9 Div 1 of the *Police Act* with respect to cases of misconduct or unsatisfactory performance. If Parliament intended police officers would not be treated any differently to any other employee, then there would be no need to establish a special attenuated removal review regime. It indicates that Parliament intended the *Police Act* to embody special provisions, to the exclusion of the general provisions of the *IR Act* regarding the remedies available in relation to discipline and dismissal of police officers.[25]

45. The analysis of Simpson AJ on this issue is persuasive:

> [65] There is nothing in the language of s 84 or the related provisions of the IR Act that differentiates between the three mechanisms for termination of employment in the Police Force: that is, absent any contraindication elsewhere, if s 84 applies to a dismissal brought about by one of those mechanisms, it could be thought to apply to dismissal under either of the other mechanisms. The converse is also true. If s 84 does not apply to a dismissal brought about by one of those mechanisms, it is difficult to see why it would apply to either of the others.
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> [66] There are, however, contraindications in the *Police Act*. Specifically, decisions under s 173 (which are not dismissals, but orders for "reviewable action" — that is, some kind of penalty), and decisions under s 181D (which are dismissals) are reviewable in the IRC. In each case, the ground for review is that the decision is harsh, unreasonable or unjust (an echo of the grounds for review under s 84). But the route to the IRC for review of s 173 and s 181D decisions is not s 84 of the IR

[25] Note *Ferdinands* at [5]-[11] (per Gleeson CJ); at [39]-[57] (Gummow and Hayne JJ).

> Act, but s 174 and s 181E, respectively, of the *Police Act*. And, as pointed out above, the procedures to be followed by the IRC are stated, not in the IR Act but in the *Police Act*, and are specific to the decisions under review. Division 1A is not concerned with termination of employment and can be left in abeyance. Its continued relevance is marginal at best.
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> [67] The enactment of Pt 9 Div 1C is a strong indication that the legislature considered that s 84 of the IR Act did not provide entrée to the IRC for police officers dismissed (removed) under s 181D. The enactment of Div 1C of Pt 9 of the *Police Act* post-dated the enactment of s 84 of the IR Act. That the legislature considered that s 84 did not apply to police officers removed under s 181D is not conclusive that it did not. But the enactment of Div 1C is a clear indication that, to the extent (if any) that s 84 applied to s 181D decisions, it was, by implication, repealed on the enactment of s 181E.

46. The analysis is strengthened with regard to removals under s 72A by the fact that, as noted above at [29], there is some potential overlap between removal under that section and the possibility of removal under s 181D because the Commissioner has lost confidence in the officer's suitability to continue as a police officer with respect to their "performance or conduct".

47. The Court of Appeal in effect took the reverse approach to that of Simpson AJ. At CA [75]-[76] and [79]-[80], the Court described the Commissioner's argument as effectively an *expressio unius* argument which "breaks against" the Commissioner because, it said, the legislature only saw the need to confine "a s 84 style" unfair dismissal review to the "less meritorious case" of a dismissal of a non-probationary police officer for cause under s 181D (at CA [80]; cf CA [70]-[75]). The Court not only treated the suggestion that medical retirements should not be capable of s 84 review as anomalous compared to disciplinary removals (CA [75]-[80]), but also stated at CA [76] that "it would be anomalous in the extreme for established officers dismissed pursuant to s 72A of the *Police Act* to be left without any recourse to challenge, on grounds that are open to other public sector employees".

48. In so doing, the Court of Appeal assumed what it sought to establish. In "construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the

legislature, and then characterise it as a statutory purpose".[26] The Court of Appeal implicitly assumed that there is a desirable policy for police officers to have access to a merits review to challenge all dismissal decisions and inferred that Parliament would not have intended for such a lacuna to exist in relation to medical retirements.

49. Secondly, in fact the purposive considerations point in the other direction. The nature of the *Police Act*, and its subject matter and scope, suggests that Parliament intended that the Commissioner is best placed to determine whether a police officer is fit or capable of performing the special duties of policing in the extreme circumstances which might be faced by a police officer. As noted above, the *Police Act* confers on the Commissioner the responsibility for the management of the functions and activities of the NSW Police Force (s 8), including designating police officers to positions to carry out operational police duties (s 11(2)). As discussed above, by virtue of the special nature of policing duties, police officers will commonly be exposed to traumatic events, and indeed may be directed to perform duties which expose them to such. And police officers are given special powers and functions, including the possession of weapons, and the potential use of force.

50. The Commissioner has a responsibility to ensure that the police officers are fit and capable to perform the dangerous and traumatic nature of police work. The Commissioner's power under s 72A is an important mechanism in ensuring that the Force retains police officers who are able to meet the highly stressful demands of the job. To that end, the Commissioner has the power to direct a police officer to attend a health assessment to determine whether the officer is fit for duty.[27] The consequences of a wrong decision in this context could be very significant. Sending an unfit officer back into duty, such as an officer who has a psychiatric condition or is at risk of rapid relapse, might constitute a danger to the officer, their colleagues, or the public. Thus there are sound reasons for Parliament to have decided that the Commissioner's power to retire police officers on medical grounds is not to be second-guessed in a merits review in the IRC.

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[26] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 14 (French CJ, Hayne, Kiefel and Bell JJ at [28])

[27] *Police Regulation* 2015 (NSW), reg 10; *Government Sector Employment Regulation 2014* (NSW), reg 15.

51. Thirdly, and related to the second point, the Commissioner's decision to retire a police officer arises where a police officer is "found on medical grounds" to be medically unfit or incapacitated, indicating that there must be a medical report containing such a finding. Contrary to CA [75], it would be a curious outcome that a police officer removed for cause under s 181D of the *Police Act* would have lesser rights than a police officer removed not for cause but based on objective grounds for medical unfitness or incapacity. This would produce anomalies. An officer removed on the grounds that the Commissioner no longer has confidence on the grounds of incompetence, misconduct, integrity or poor performance may have a significant adverse impact on his or her professional and personal reputation (depending on the circumstances). In that context, there are evident policy reasons for giving police officers limited rights to merit review. On the other hand, officers retired on medical grounds depart the Police Force founded on objective grounds contained in a report from a medical practitioner. Given the special considerations that apply to police officers, it is more likely that Parliament did not intend that a police officer would have recourse of the IRC other than provided for under the *Police Act*.

52. Fourthly, the Court of Appeal emphasised the unfettered nature of s 80(3) considered in *Eaton*[28] and noted that s 72A is not expressed in the same terms: CA [72]. The power in s 72A depends upon the satisfaction of certain necessary preconditions of unfitness and permanency, which, as noted, are essentially of a medical kind. Once those conditions are satisfied the language of s 72A, like the language of s 80(3), suggests an unfettered power to take the action for which the section provides: note PJ [90].

53. Fifthly, consistent with its discretionary character, there is no duty on the Commissioner to give reasons for decisions made under s 72A. That stands in contrast to the requirement for decisions made under s 181D, which contains a detailed procedural fairness regime (s 181D(3)), including that written notice be given by the Commissioner setting out his reasons for removing the police officer (s 181D(4)). The starting point of the IRC's review is the Statement of Reasons given for a police officer's removal (s 181F(1)(a)). By contrast, under the *IR Act*, the IRC is merely required to give consideration to any reasons given by

[28] Heydon J at [11]-[12], plurality at [74] and [90].

the decision-maker (ss 88(a) and (b)). The absence of a duty to give reasons was considered by the majority in *Eaton* to weigh against a finding that the *IR Act* regime was intended to apply.[29] As the plurality said at [74], "[t]he intended legal effect of the Commissioner not being required to give reasons is that the Commissioner's decision cannot be impugned on account of any particular reason". The Court of Appeal erred in not referring to the absence of the duty to give reasons in relation to a decision made under s 72A.

54. Sixthly, contrary to CA [71]-[72], once the statutory preconditions for an officer to be medically retired have been met, the primary judge was correct to conclude that it leaves "little room for a finding of harshness, unreasonableness or unjustness in a determination to cause the police officer to be retired": PJ [96]. Ongoing appointment as a police officer who has been found, based on a medical report from a medical practitioner, to be permanently unfit for duty would be pointless.

55. At CA [71], the Court of Appeal suggests that there are a number of non-medical assessments to be made such as the level of fitness required and whether or not the unfitness or incapacity has arisen from causes within the officer's control. Yet the decision will commonly involve both a significant medical element, and then a judgment as to fitness/suitability. The level of fitness required to perform the duties of a police officer involves identifying the duties to be performed by a police officer at the relevant level/seniority, and medical assessments of the fitness/capacity of the officer. Once the medical condition is identified, issues of judgement then arise as to whether or not, given that condition, the officer is fit for duty. It is the Commissioner who is best placed to make an assessment of whether various kinds of medical unfitness or incapacity are such as to render police officers unsuitable to remain as such.

56. Seventhly, there is also a potential inconsistency between the remedies including reinstatement or re-employment in a different position under s 89 of the *IR Act*. Reinstatement is not an available or appropriate remedy in respect of a police officer who fulfils the preconditions of s 72A and can no longer perform the inherent requirements of the

[29] Heydon J at [13]-[14], plurality at [54], [57], [64] and [74]-[75].

position on the grounds of medical unfitness or incapacity.[30] Again, that is a judgement which the Commissioner is best placed to make. Re-employment undermines the ability of the Commissioner to determine which officers should serve where in the disciplined and hierarchical structure of the Police Force. Just as the Commissioner has an interest in "maintaining the integrity of the NSW Police Force" (as referred to in s 181F(3)(b)), so they have an interest in maintaining the ability of the Police Force to achieve its objectives and duties efficiently and efficaciously, including by allocating human resources appropriately. The Commissioner has the ultimate responsibility for the effective, efficient and economical management of the functions and activities of the NSW Police Force, including designating police officers to positions to carry out, or to be concerned in, operational policing duties (s 11(2)).

57. Eighthly, in contrast to police officers, administrative employees of the NSW Police Force (i.e. not police officers) have their employment expressly governed by other legislation including the *Government Sector Employment Act 2013* (NSW) (**GSE Act**) and the *IR Act*. Relevantly, ss 68, 69 and 70 of the *GSE Act* apply to administrative officers (but not police officers) concerning the management of unsatisfactory performance and misconduct, and Pt 7 of Ch 2 of the *IR Act* grants appeal rights from disciplinary decisions: see also s 185 of the *Police Act*. This is another indicator that Parliament turned its mind to the circumstances in which members of the NSW Police Force are entitled to challenge employment decisions under the *IR Act*.

Sections 85 and 218 of the *Police Act*

58. The Court of Appeal gave some emphasis to the fact that s 85 of the *Police Act* "contemplates proceedings relating to a non-executive police officer being held before a competent tribunal with jurisdiction to deal with industrial matters": CA [62]. Yet, as noted above, the point of s 85 is to deem the Commissioner to be the employer of police officers for the purposes of industrial matters, even though such officers are not in fact employees. And there is no doubt that there are many respects in which the IRC *does* have jurisdiction

[30] Note PJ [91]; see further *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at [33]-[34] (McHugh J); [43]-[44] (Hayne J).

to deal with police matters – which leads to s 218 of the *Police Act*.

59. The Court of Appeal placed significant weight upon s 218 in reaching its conclusion: CA [64]-[65], [69], [79]-[80]. Section 218(1) provides that "The Industrial Relations Act 1996 is not affected by anything in this Act." Section 218 is a form of savings provision designed to avoid implied repeal.[31] However, its meaning and operation must be determined according to its context. The Court of Appeal erred in adopting a more literal construction of s 218(1) which this Court rejected in *Eaton*. The Court of Appeal effectively limited its consideration to a search for *express* inconsistency, as though the sole or main basis of the majority decision in *Eaton* was some such express inconsistency with the text of s 80(3): CA [64]-[65], [79]-[80].

60. In *Eaton* at [82], the plurality noted that s 218(1), if read literally, appears to give primacy to the *IR Act* over the *Police Act*. The majority considered that s 218 did not have a literal operation, as there were numerous examples where the *Police Act* has a direct impact on the *IR Act*.[32] The plurality stated that "an *implication* of inconsistency with the general provision will suffice to oust its application" (at [89], emphasis added). In concluding that an implication of an inconsistency existed as regards s 80(3), the plurality did not limit its reliance to the language of s 80(3), but held "[t]hat implication is supported by other aspects of the construction of the *Police Act*, to which reference has been made" (at [90]). Thus one comes back to construing the two statutory schemes together as a whole, taking account of the sorts of considerations addressed above.

61. Moreover, the Court in *Eaton* agreed with the Full Bench that, on a proper construction, s 218 leaves intact the IRC's power to deal with "industrial matters" concerning police officers unless otherwise "especially restricted by a provision of the *Police Act*"[33]. The Court of Appeal does not refer to, let alone seek to identify, whether s 72A read in its statutory context, the content of the expression otherwise "especially restricted by a

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[31] *Australian Oil Refining Pty Ltd v Cooper* (1987) 11 NSWLR 277 at 280; *Crown Employees Lands Officer (Department of Lands) Award* (1992) 40 IR 120 at 134; *Public Employment Industrial Relations Authority v Health and Research Employees' Association (NSW)* (1994) 54 IR 162 at 182-183.

[32] *Eaton* at [32]–[34] (Heydon J) and [83]–[91] (Crennan, Kiefel and Bell JJ).

[33] At [34] (Heydon J); [90] (Crennan, Kiefel and Bell JJ).

provision of the *Police Act*" adopted in *Eaton*.

62. This reference to "industrial matters" has to be understood in the context of the earlier discussion of the nature and scope of the *IR Act* by the plurality at [40] and [43]. As their Honours stated at [43], that Act is "a general statute applying to industrial relations between employers and employees", and it "may be accepted that, in many respects, it applies to the conditions of employment of police officers". For example, certain industrial disputes may be dealt with by the IRC (*IR Act*, Ch 3) and the IRC can make awards governing the terms and conditions of police officers' appointment (*IR Act*, Ch 2). The point being made by the plurality was that there was still plenty of scope for the *IR Act* to operate with respect to police officers, giving some work for s 218 to do, without applying it to dismissal under s 80(3) of the *Police Act*. The same point applies here in relation to s 72A.

PART VII: ORDERS SOUGHT

63. Orders sought (noting the Appellant has undertaken to pay the First Respondent's costs):

(1) Appeal allowed.

(2) Set aside that part of order 1 allowing the appeal, along with order 3, of the Court of Appeal made on 27 July 2020, and in lieu thereof, order that the First Respondent's appeal be dismissed.

PART VIII: TIME REQUIRED

64. The Appellant will require approximately 2 hours to present oral argument.

31 May 2021

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Annexure to the Appellant's Written Submissions – Legislative Provisions

Legislative provision	As in force at	Page
Industrial Relations Act 1996 (NSW) s. 84	14 December 2016	1
Police Act 1990 (NSW) s. 72A	14 December 2016	1
Judiciary Act 1903 (Cth) s. 78B	1 June 2021	1
Industrial Relations Act 1996 (NSW) Part 6 of Chapter 2, ss. 83-90B	14 December 2016	2
Police Act 1990 (NSW) s. 85	14 December 2016	3
Police Act 1990 (NSW) s. 218	14 December 2016	3
Industrial Relations Act 1996 (NSW) s. 3	14 December 2016	3
Industrial Relations Act 1996 (NSW) s. 146	14 December 2016	3
Industrial Relations Act 1996 (NSW) s. 9	14 December 2016	3
Police Act 1990 (NSW) ss. 4-8	14 December 2016	4
Police Act 1990 (NSW) s. 201	14 December 2016	4
Police Act 1990 (NSW) s. 71	14 December 2016	4
Police Act 1990 (NSW) s. 82G	14 December 2016	4
Weapons Prohibition Act 1998 (NSW) s. 6	14 December 2016	5
Police Act 1990 (NSW) s. 72	14 December 2016	5
Police Act 1990 (NSW) s. 80	14 December 2016	5
Police Act 1990 (NSW) Part 9, ss. 173-187	14 December 2016	5
Police Act 1990 (NSW) s. 94B	Current	5
Industrial Relations Act 1996 (NSW) s. 162	14 December 2016	6
Industrial Relations Act 1996 (NSW) s. 163	14 December 2016	7
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Police Act 1998 (SA)	22 November 2001	11
Industrial and Employee Relations Act 1994 (SA).	22 November 2001	11
Police Regulation 2015 (NSW) reg 10	14 December 2016	15
Government Sector Employment Regulation 2014 (NSW) reg 15	14 December 2016	15
Police Act 1990 (NSW) s. 11	14 December 2016	18
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