



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

No. S56/2021

**NSW COMMISSIONER OF POLICE**  
 Appellant

and

**TREVOR COTTLE**  
 First Respondent

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**INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES**  
 Second Respondent

**Part I: CERTIFICATION**

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

**Part II: FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

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2. The First Respondent agrees with and adopts the Appellant's statement as to the issue for determination.

3. The Court of Appeal approached the issue of construing the two statutes and their overlapping function in much the same way as the High Court did in *Eaton*, and up to the point of considering the specific provision of the Police Act in question (here 72A; in *Eaton* 80(3)), the conclusion was much the same. The criticism levelled at the Court of Appeal's methodology of approaching the task of statutory construction by the Appellant is unfounded.

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4. The Court of Appeal did not approach the task of construing the two statutes by giving the IR Act presumptive primacy. Rather, the Court of Appeal noted when analysing the inter-relationship between the IR Act and the Police Act that the IR Act in terms applies to non-executive police officers and that the Police Act states in broad and unqualified language that nothing in it affects the operation of the IR Act.

5. The Court of Appeal approached the The Court of Appeal correctly observed that contrary to the position taken by the Commissioner of Police, s 72A requires far more than a medical assessment to be made. Rather, it requires a number of non-medical assessments to be made, including what level of fitness is required to discharge the duties of the officer's position, and whether or not the unfitness or incapacity has arisen from causes within the officer's control. In the same paragraph, the Court of Appeal correctly described a decision pursuant to s 72A as one which, by the use of the word "may" also involves an ultimate exercise of discretion by the Police Commissioner.
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6. Section 85 of the Police Act makes it clear that police officers are to be treated as any other public sector employee when it comes to proceedings relating to a non-executive police officer held before the IRC. The High Court noted in *Eaton* (at [43]) that "in many respects, [the IR Act] applies to the conditions of employment of police officers", the Court of Appeal further referenced s 218(1) of the Police Act to emphasise the point.
7. From the Court of Appeal's summary of the overlapping statutory framework (at [62]), it can be further noted that there are other clear indicators that the unfair dismissal provisions in Part 6 of Ch 2 of the IR Act apply to police officers, including s 83(1)(a) of the IR Act which provides that Pt 6 applies to the dismissal of any "public sector employee" and the Dictionary to the IR Act which defines "public sector employee" as including a member of the NSW Police Force. Section 405 of the IR Act is also referred to in the judgment below, and provides that an award or order of the IRC has no effect where there is inconsistency between such award or order of the IRC and any right of appeal under the Police Act or any function under the Police Act with respect to the discipline, promotion or transfer of a police officer, or with respect to police officers who are hurt on duty. However, at 405(3) that section expressly "*does not affect any decision of the Commission under Part 6 of Chapter 2 (Unfair dismissals)*".
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8. The plurality in *Eaton* discussed s 405 and s. 405(3) of the IR Act and accepted (at [81]) insofar as an order made on an unfair dismissal claim might be said to cut across disciplinary functions, s 405(3) confirms that a decision made under Part 6
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of the IR Act is unaffected, and in that sense Part 6 of Ch 2 of the IR Act may prevail to the extent of any inconsistency, as Handley AJA had observed in the Court below. However, the plurality noted that s 405(3) assumes that the decision is made within the jurisdiction of the IRC pursuant to the power given by Part 6, and therefore it is "...not helpful in answering the question whether Pt 6 applies to a probationary constable."

9. As the High Court did in *Eaton*, the Court of Appeal found no express inconsistency in the unfair dismissal provisions of the IR Act applying the dismissal of a police officer whose dismissal did not attract a right of review under Div 1B of Part 9 of the Police Act. The decision of the plurality in *Eaton* expressly accepted that Section 218 of the IR Act must be construed as "...leaving intact the power of the Commission to deal with industrial matters covering police officers unless especially restricted by some provision of the *Police Act*." The plurality in *Eaton* went on to conclude that the IR Act may apply generally to the Police Act, but not where the operation of the former produces an internal inconsistency in the latter. The conclusion was to the effect that the general provisions of the IR Act will apply to Police officers, unless they fly in face of the special, and inconsistent, terms such as those in s 80(3) of the Police Act (at [91] to [92]).
10. Consistent with the approach of this Court in *Eaton*, the Court of Appeal then turned to the question of whether there is any statutory indication in the Police Act, either analogous to s 80(3) as addressed in *Eaton*, or otherwise, which warrants construing s. 218 of the Police Act as internally inconsistent with other provisions of that Act, and found there were no such statutory indications (at [69]).

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