HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Jul 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S56/2021
File Title:	NSW Commissioner of Police v. Cottle & Anor
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions
Filing party:	Respondents
Date filed:	13 Jul 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

NSW COMMISSIONER OF POLICE

Appellant

and

TREVOR COTTLE

First Respondent

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Second Respondent

(PROPOSED) INTERVENER'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

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

PART II BASIS FOR INTERVENTION

2. The Police Association of New South Wales (**Police Association**) seeks leave to intervene in this proceeding in support of the first respondent. The Police Association is an industrial organisation of employees registered under the *Industrial Relations Act 1996* (NSW) (**IR Act**).
3. The issues which arise in this appeal concern the power of the Industrial Relations Commission of New South Wales (**IRC**) to hear and determine applications for unfair dismissal remedies pursuant to s 84 of the IR Act filed by a police officer retired on medical grounds under s 72A of the *Police Act* 1990 (**Police Act**) (and now s 94B). The Police Association seeks to be heard in relation to that matter.
4. The Police Association was granted leave to intervene by the Court of Appeal in the proceeding the subject of this appeal: *Cottle v NSW Commissioner of Police* [2020]

NSWCA 159; 298 IR 202 (**CA**) at [19]. If leave to intervene is granted, the Association proposes to make submissions consistent with its submissions to the Court of Appeal and, in particular, to assist by providing an overview of relevant statutory history and the interaction of the IR Act and the Police Act.

PART III REASONS FOR LEAVE

5. The Police Association has coverage under its registered rules entitling it to enrol as members, and represent the industrial interests of, sworn police officers of the NSW Police Force. It is the only registered organisation of employees in New South Wales entitled to represent the industrial interests of police officers.

6. The Commissioner of Police medically retires, on average, in excess of 30 police officers each month. The outcome of this appeal is likely to have a significant ongoing impact on the rights of a large number of police officers who are members or potential members of the Police Association, and on the Association directly insofar as it may act in the interests of those officers. The Police Association is entitled to initiate unfair dismissal proceedings in the IRC on behalf of its members, alleging the dismissal was harsh, unreasonable or unjust.[1]

7. It is the Police Association's position that the Court of Appeal correctly held that Part 6 of Chapter 2 of the IR Act applies to police officers with respect to whom a decision under s 72A (and now s 94B) has been made. The Police Association seeks to be heard as to the interaction of the Police Act and the IR Act in the context of the jurisdiction of the IRC to hear unfair dismissal applications.

PART IV ARGUMENT

8. These submissions address three issues: statutory construction, legislative history and then the eight textual, contextual and purposive points relied upon by the appellant.

Statutory Construction

9. The Police Association agrees that the question arising is as posed in the appellant's submissions at Part II paragraph [1]. The question is one of statutory construction.

10. The Association takes issue with three propositions advanced by the appellant in that respect. The first, at [37] and [38] of the appellant's submissions, is the assertion that

[1] IR Act, s 84(2) and (3).

the Court of Appeal erred in its approach by giving "*presumptive primacy*" to the IR Act over the Police Act. The Court of Appeal made no such presumption. Rather, the Court took the orthodox, and correct, approach to the issue before it, which was to consider the natural and ordinary meaning of the words of the legislation (CA [58]).

11. In any event, it is correct to presume that where Parliament enacts two pieces of legislation, it intended both to operate. Implied repeal will be *"a comparatively rare phenomenon"* and will not be held to have been effected *"unless actual contrariety is clearly apparent"*.[2] "*The question is not whether one law prevails, but whether that presumption is displaced"*.[3] There must be *"very strong grounds to support [the] implication, for there is a general presumption that the legislature intended that both provisions should operate"*[4]. Additional considerations arise here. No presumption that the IRC has jurisdiction is required. The IR Act expressly provides that Part 6 of Chapter 2 applies to a *"public sector employee"*, including a member of the NSW Police Force.[5] Section 218 is also relevant. As the plurality in *Eaton* acknowledged, the effect of s 218 is that the power of the IRC to deal with industrial matters concerning police officers is preserved unless "*especially restricted*" by a provision of the Police Act[6]. The Commissioner of Police *"is to be the employer of non-executive officers for the purposes of any proceedings relating to non-executive officers held before a competent tribunal having jurisdiction to deal with industrial matters"*[7]. The *"termination of employment of …any person or class of persons in any industry"*, is expressly an *"industrial matter"*[8].

12. Secondly, it is submitted, at [36] of the appellant's submissions, that the Court of Appeal erred by adopting the presumption identified in *Owners of Shin Kobe Maru v Empire Shipping Company Inc*.[9] Again, it is not clear that the Court of Appeal did so. If it did, no error arises. A presumption of that type has been applied in relation to the

---

[2] *Butler v Attorney-General (Victoria)* (1961) 106 CLR 268 at 276; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [43].
[3] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [48] per Crennan, Kiefel and Bell JJ (***Eaton***)
[4] *Saraswati v The Queen* (1991) 172 CLR 1 at 17, adopted in *Shergold v Tanner* (2002) 209 CLR 126 at [34] and by *Gummow* and *Hayne* JJ in *Ferdinands* at [18].
[5] IR Act, s 83(1)(a) and Dictionary.
[6] *Eaton* at [91] per Crennan, Kiefel and Bell JJ.
[7] *Police Act*, s 85
[8] IR Act, s 6(2)(e).
[9] *Owners of Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203 and 205; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at [11]; *Shergold v Tanner* (2002) 209 CLR 126 at [34].

jurisdiction of the IRC with respect to dismissals.[10] Such an approach is appropriate. The right to seek redress in the event of dismissal such as that found in s 84 of the IR Act is obviously designed for a beneficial purpose and to confer novel rights which did not exist at common law.[11] It is, as the Court of Appeal noted, an *"important statutory right"* (CA [70]). Where there is doubt as to parliamentary intention, the courts should favour an interpretation which safeguards the individual.[12] Legislation should not be construed as withdrawing a statutory right to seek review with respect to the termination of an individual's career as a police officer in the absence of express words or clear inconsistency. In any event, it bares repeating that a *"public sector employee"*[13] is defined to include a member of the NSW Police force.

13. Thirdly, at [39], [42] and [43] of its submissions, the appellant contends that the Police Act contains a comprehensive and intelligible scheme as to the appointment, conduct, discipline and removal of police officers and that the "special circumstances" of police are inapt to be addressed through review by the IRC. The proposition that Parliament has consistently regarded police as a special case and inappropriate for supervision by the IRC is not supported by the current statutory regime or the statutory history. As the Court of Appeal observed (CA [74]), the force of the appellant's argument is substantially diminished by the fact that Division 1C of Part 9 of the Police Act provides for review of the removal of an officer in whom the appellant does not have confidence (having regard to the officer's competence, integrity, performance or conduct), on the ground that the removal was harsh, unreasonable or unjust. The legislative history of the interaction between the Police Act and the IR Act also demonstrates that Parliament has repeatedly made specific provision to ensure that police officers, and the industrial organisation representing them, have access to remedies in the IRC.

14. It is appropriate to turn first to the legislative history and then address the specific contentions advanced by the appellant in support of its submissions that the Police Act withdraws the IRC's unfair dismissal jurisdiction with respect to medical retirements under s 72A (and now 94B).

---

[10] *Spiers v Industrial Relations Commission (NSW)* (2011) 81 NSWLR 348 at [89].
[11] *Cole v Director-General of Department of Youth and Community Services* (1986) 7 NSWLR 541 at 543; *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648 at 654.
[12] *Buck v Comcare* (1996) 66 FCR 359 at 364; *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449 at [33]; *Anglican Care v NSW Nurses and Midwives' Association* (2015) 231 IR 316 at [59].
[13] IR Act, s 83(1)(a) and Dictionary

Legislative History

15. Whilst the Court of Appeal did not see it necessary to rely on the legislative history, that history provides a clear answer to the appellant's contention that the legislature intended to limit police officers access to the IRC's jurisdiction and supports the conclusion of the Court of Appeal.

16. Police officers were first given access to the industrial tribunal in New South Wales by the enactment of the *Industrial Arbitration (Police) Amendment Act* 1946. The Long Title describing the Act as *"An Act to apply certain provisions of the Industrial Arbitration Act, 1940 – 1943, to members of the police force…"*. The mechanism by which that was achieved was the removal of an exemption from the definition of *"Employees of the Crown"* as then appearing in the *Industrial Arbitration Act* 1940, and the express inclusion of the words *"and employees employed under the Police Regulation Act 1899, or any statute passed in substitution or amendment of the same"*.[14]

17. In December 1973, a number of matters were referred to the Industrial Commission for "consideration and report", including whether to extend the jurisdiction of the Industrial Commission to persons employed under the *Public Service Act* 1902, the *Police Regulation Act* 1899 and the *Teaching Service Act* 1970. The Commission's report, published in December 1974, made recommendations that those persons employed be given greater access to the industrial tribunal.[15] Parliament then enacted the *Industrial Arbitration (Amendment) Act 1976*[16] to give effect to the President's recommendations. Upon the second reading of the Bill, the Minister described the background in this way (emphasis added)[17]:

> *The inquiry conducted by the President of the Industrial Commission was instituted for the purpose of determining whether the limitation on access to industrial tribunals for these public servants was appropriate in this day and age. The President reported that, in his opinion, it was in the public interest,*

[14] See s 2(a)(i) and (ii) of the *Industrial Arbitration (Police) Amendment Act* 1946.
[15] Some of the then President's recommendations pertinent to Police are extracted in the judgment of Boland J in *Police Association v NSW Police (No.3)* (2005) 144 IR 150 at [39].
[16] The Long Title describing it as "*An Act to amend the Industrial Arbitration Act, 1940, with respect to the rights of certain employees of the Crown and members of the police force".*
[17] The history is briefly traced by the Court of Appeal in *Public Service Association of New South Wales & Ors v Industrial Commission of New South Wales & Anor* (1985) 1 NSWLR 627 at 632.

> *and, naturally, in the interests of the public servants themselves, that with limited exceptions the powers of industrial tribunals be extended to enable them to make awards for public servants to the same degree as awards can be made in respect of employees in private industry. I again emphasize that the bill will give effect, completely, to the commission's findings.*

18. The enactment of *Industrial Arbitration (Amendment) Act* 1976 significantly expanded the capacity of trade unions on behalf of police officers and other government workers to raise industrial disputes before, and seek remedies from, the Industrial Commission.[18] Its effect was to bring those covered by the amendments *"within the general-award making jurisdiction of the Commission"*.[19] The amendments made by the *Industrial Arbitration (Amendment) Act* 1976, included the enactment of s 20(1D) that relevantly provided:

> *"(1D) Nothing in this Act authorises the making of an award that:*
>
> *...*
>
> *(d) is inconsistent with any right, power, authority, duty or function conferred or imposed by or under the provisions of the Police Regulation Act, 1899, with respect to the discipline, promotion or transfer of a member of the police force;...*

19. Consistent with the Recommendations of President Beattie, the amendments limited the power of the Commission to make an award "inconsistent with", amongst other things, *"any right, power, authority, duty or function conferred or imposed by or under the provisions of the Police Regulation Act 1899, with respect to the discipline, promotion or transfer of a member of the police force"* [20], (the genesis of the current provision in s 405(1)(b) of the IR Act), but did not confine the capacity to make an award more generally.

20. The Commission's power to make an award providing for the reinstatement of an "employee", including a police officer, was specifically confirmed by the enactment of s 20A of the *Industrial Arbitration (Reinstatement Awards) Amendment Act 1978*. Section 20(1D) as enacted by the *Industrial Arbitration (Amendment) Act 1976*, was

---

[18] See *Police Association v NSW Police (No.3)* (2005) 144 IR 150 at [38]-[47].
[19] *Public Service Association of New South Wales & Ors v Industrial Commission of New South Wales & Anor* (1985) 1 NSWLR 627 at 632.
[20] Section 20(1D)(d).

specifically amended so as to insert the words "(section 20A excepted)" after the word "Act" where first appearing. Interpolating that amendment into the parent Act, the section read: *(1D) Nothing in this Act …(section 20A excepted) …authorises the making of an award that: …*".

21. The amendments also included s 20A(4) that prohibited the making of a reinstatement award:

> *(a) if-*
>
> *(i) under the provisions of any other Act or of any regulations or by-laws made under any other Act, an order or direction may be made awarding any redress to the dismissed employee in respect of his dismissal or to the employee proposed to be dismissed in respect of his proposed dismissal or requiring an inquiry to be held relating to the dismissal or proposed dismissal of the employee; and*
>
> *(ii) the dismissed employee or the employee proposed to be dismissed has not lodged with the registrar an instrument in writing refusing the benefit of the provisions referred to in subparagraph (i); or*
>
> *(b) if proceedings under the provisions referred to in paragraph (a) (i) have been commenced by the dismissed employee or the employee proposed to be dismissed."*

22. These amendments specifically permitted a police officer (along with members of the public service, the health service, or the teaching service) to elect whether to pursue relief from a dismissal or proposed dismissal, following the proof of a disciplinary charge by the Police Tribunal,[21] by either an appeal to the Crown Employees Appeal Board[22] or with the support of their union by notification of a dispute to the Industrial Commission for a reinstatement Award.

23. As the Second Reading of the Bill that gave rise to the *Industrial Arbitration (Reinstatement Awards) Amendment Act* 1978 made plain, these amendments arose from a judgment of the High Court in *North West County Council v Dunn* (1971) 126

[21] The Police Tribunal was constituted under Part VII of the *Police Regulation (Allegations of Misconduct) Act* 1978, with the "exclusive" original jurisdiction to hear and determine a departmental charge preferred against and denied by a member of the police force (s 41), noting there was an internal review of such a finding to the Tribunal's Review jurisdiction: see s 43. Disciplinary action in the form of punishment was taken after a departmental charge was found proved by the Tribunal, see Rule 42(1) of the Police Rules, or in one of the other circumstances contemplated by Rule 42(3), (4), or (5) of the Police Rules, 1977.

[22] Pursuant to the *Police Regulation (Appeals) Act* 1923.

CLR 247,[23] in which the High Court held that there was an implicit inconsistency between the existence of a specific remedy for a municipal employee under the Local Government Act who had been dismissed for misconduct, and the continued capacity to pursue an order for reinstatement in the context of a dispute under the Industrial Arbitration Act. The amendment to the Industrial Arbitration Act was designed specifically to reinstate the *"jurisdiction which* [the Commission had] *exercised over a considerable period in determining questions concerning reinstatement in employment of an employee dismissed by a municipal authority"*[24].

24. The Minister specifically identified why, despite *Dunn* dealing with the circumstances of a local government employee, the amendments extended to public sector workers more broadly.[25] The requirement imposed by s 20A(4) that the dismissed employee with other mechanisms of redress lodge an instrument *"with the registrar …refusing the benefit of the provisions referred to"*, reflected an election so that a dismissed employee (including police officers) would have the option to pursue relief from their dismissal under the Industrial Arbitration Act or to pursue redress under a specific statutory scheme (for example, a review before the Crown Employee Appeals Board pursuant to the *Police Regulation (Appeals) Act* 1923 or by the Government and Related Employee Appeals Tribunal[26] upon its creation in 1980).

25. At least from the time of the *Industrial Arbitration (Reinstatement Awards) Amendment Act* 1978, police officers, like other public servants, if dismissed for any reason could, with the assistance of their union, notify a dispute to the Industrial Commission (or a conciliation committee) and pursue an award providing for their reinstatement.[27] If dismissed as a disciplinary punishment, a police officer could elect to pursue either an application for review of the punishment to the Crown Employee Appeals Board (and later the Government and Related Employee Appeals Tribunal), or to notify a dispute to the Commission to pursue a reinstatement Award.

26. In 1991, the NSW government enacted the *Industrial Arbitration (Unfair Dismissal) Amendment Act* 1991, affording an individual dismissed employee the right to make

---

[23] Second Reading of the *Industrial Arbitration (Reinstatement Awards) Amendment Bill (No.2)*, Legislative Assembly, 15 November 1978, pg 387.
[24] Ibid pg 388.
[25] Ibid pg 388-389.
[26] See Item 6(d) of Schedule 1 to the *Police Regulation (Appeals) Appeal Tribunal (Amendment) Act* 1980, which amended s 6(2) of the Police Regulation (Appeals) Act 1923 so as to provide *"The Government and Related Employees Appeal Tribunal Act, 1980, shall apply to and in respect of an appeal made to the Tribunal under this section in the same way as it applies to and in respect of an appeal under section 24 of that Act".*
[27] *Industrial Arbitration Act* 1940, s 20(1)(e).

application in relation to an allegedly unfair dismissal without notifying a dispute to the Commission via their trade union.[28] For *"a person employed in the public sector"*, which included a police officer, an extended meaning was given to the notion of "dismissal", reflecting what is now found in s 83(5)(b) of the IR Act.[29] The individual right to bring an unfair dismissal proceeding was retained in Part 8 of Chapter 3 of the *Industrial Relations Act* 1991. Proceedings could be brought by *"an employee of the Crown"*[30] including *"a member of ... the Police Service ..."*.[31]

27. Section 349 provided *"The Commission has no jurisdiction to make an award or order that: ...(b) is inconsistent with any function conferred or imposed by or under the provisions of the Police Service Act 1990 with respect to the discipline, promotion or transfer of a police officer, or with respect to police officers who are hurt on duty"*. However, subsection 349(3) provided: *"This section does not apply to the jurisdiction of the Commission under Part 8 of Chapter 3 (Unfair Dismissal)"*, confirming that a police officer could, like any other public servant, elect to bring a challenge to a disciplinary decision to punish by way of dismissal, to GREAT or the Industrial Relations Commission.

28. The 1991 Act was replaced by the current IR Act in 1996. The unfair dismissal jurisdiction of the IRC in Part 6 of Chapter 2 expressly applied to a "public sector employee" defined so as to include a member of the Police Service.[32] Section 405(1)(b) continued to provide that an award or order of the IRC does not have effect to the extent that it is inconsistent *with "a function under the Police Service Act 1990 with respect to the discipline, promotion or transfer of a police officer, or with respect to police officers who are hurt on duty"* other than, as provided in s 405(3), *"any decision of the Commission under Part 6 of Chapter 2 (Unfair dismissals)"*. The express assumption in the new IR Act was that police officers would be subject to Part 6 of Chapter 2.

29. Prior to the *Police Service (Complaints, Discipline and Appeals) Amendment Act* 1993, the statutory framework for the making and investigations of complaints against police, and the mechanism for disciplining officers found to have breached acceptable standards of conduct was found in the *Police Regulation (Allegations of Misconduct)*

[28] *Industrial Arbitration Act* 1940, s 91ZC.
[29] *Industrial Arbitration Act* 1940, s 91ZB.
[30] *Industrial Relations Act* 1991, s 245(1)(a).
[31] *Industrial Relations Act* 1991, s 5.
[32] IR Act, s 83(1)(b) and Dictionary.

Act 1978. As noted above, appeals from disciplinary decisions to punish a police officer, including by way of dismissal, could be taken, on the officer's election, to either the Industrial Commission or to the GREAT. That disciplinary scheme was amended over time and was absorbed into the Police Act by the *Police Service (Complaints, Discipline and Appeals) Amendment Act* 1993.

30. The immediate predecessor to the current Commissioner's confidence removal power was found in the enactment of the *Police Service Amendment Act* 1995. It empowered the Commissioner to dismiss a police officer where the *Commissioner "formed the opinion, based on information arising out of the Police Royal Commission, that the officer: …(a) has engaged in corrupt conduct (or any other conduct constituting an indictable offence), and…is no longer a fit and proper person to hold a position in the Police Service"*: s 181B(1). No specific scheme for the review of a removal under s 181B was provided. Police continued their ability to pursue unfair dismissal applications under the *Industrial Relations Act* 1991.[33]

31. The current Commissioner's confidence removal power is found in Division 1B of Part 9 of the Police Act, specifically s 181D. It was enacted by the *Police Legislation Further Amendment Act* 1996, which gave effect to a number of interim recommendations of the Wood Royal Commission, prior to the release of its final report.[34] In its original form, s 181D(6) and (7) limited review of a decision or order of the Commissioner to remove a police officer *"under [that] section"* to the Supreme Court and excluded the jurisdiction of GREAT and the Industrial Relations Commission.

32. The *Police Legislation Amendment Act* 1997 altered the review mechanisms from an Order under s 181D, a step designed to *"protect against injustice"*, by creating the merits review in the Industrial Relations Commission now found in Division 1C of the IR Act. The system so created was described by the Minister for Police as intended to put police officers "*on a similar footing to other employees under the Industrial Relations Act*".[35] The *Police Service Amendment Act* 1997 enacted (in substance) what is now Division 1C of the Police Act,[36] and amended s 181D to reflect subsections (6), (7) and (7A) and (7B) in their current form[37]. Until the enactment of the *Police Service*

[33] Section 181B(4) and (5).
[34] See Second Reading, Whelan, Minister for Police, Legislative Assembly, 13 November 1996 pg 5909. The report was known as the Immediate Measures Interim Report of the Royal Commission.
[35] Legislative Assembly, Whelan, Minister for Police, 18 June 1997, pg 10563.
[36] Item 4 of Schedule 1 of the *Police Service Amendment Act* 1997.
[37] Items 1 to 3 of Schedule 1 of the *Police Service Amendment Act* 1997.

Amendment (Complaints and Management Reform) Act 1998, in addition to removal under s 181D, the Commissioner of Police continued to have the capacity to dismiss a police officer as a disciplinary measure upon the proof of a departmental charge under Division 1 of Part 9 of the Police Act, which could then the subject of unfair dismissal proceeding in the IRC.

33. It can be seen from the above review that, whilst historically police have had a disciplinary scheme that included a specific review mechanism (as there was for other public servants), the amendments made to the *Industrial Arbitration Act* 1940 in 1976 and 1978 were designed to make the industrial rights of public servants, teachers and police broadly reflective of those available to the workforce generally. Since at least 1976, and more specifically since 1978, and up until the enactment of the *Police Legislation Further Amendment Act* 1996 police officers have had the same *"rights of appeal"* from decisions to dismiss, for any reason, as any other member of the public service, and thereafter it was only removal under the loss of confidence removal power that was expressly qualified. The default position, throughout this period, is that police officers have the same rights to seek review of dismissal decisions as other public sector employees unless specifically removed or altered by the Police Act.

Eight Points Raised by the Appellant

34. Against the express language of the Police Act and the IR Act, and the legislative history, the appellant's submissions commencing at [43] contend that eight textual, contextual and purposive points support a conclusion that 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. That, it is said, does not include review of a decision to medical retire an officer under s 72A under Part 6 of Chapter 2 of the IR Act. For the reasons which follow, those submissions are unpersuasive.

First Supporting Contention

35. The first contention raised at [44] of the appellant's submissions is that, by providing specific jurisdiction to the IRC in Division 1B and 1C of Part 9 of the Police Act in relation to the removal of police officers on confidence grounds, that is different to and less beneficial to an officer, the legislature's intention was to exclude the general system of review for unfair dismissal under the IR Act.

36. The existence of s 181D and Division 1C does not determine the scope of the Commission's jurisdiction more generally. The legislature did not leave the interaction

of the specific disciplinary removal and review mechanisms in Division 1B and 1C of Part 9 with other statutes, to implication. It dealt with the interaction expressly. Sections 181D(7) provides (emphasis added):

> *(7) Except as provided by Division 1C—*
>
> *(a) no tribunal has jurisdiction or power to review or consider any decision or order of the Commissioner* ***under this section****, and*
>
> *(b) no appeal lies to any tribunal in connection with any decision or order of the Commissioner* ***under this section****.*
>
> *In this subsection,* ***tribunal*** *means a court, tribunal or administrative review body, and (without limitation) includes the Industrial Relations Commission.*

37. The scope of the privative provision in s 181D(7) is limited to "*any decision or Order of the Commissioner under this section".* Whilst it is plain that the legislature intended to confine the capacity of the IRC to review a decision *"under this section"* (as it had since the *Police Legislation Further Amendment Act* 1996). There is no indication that the limitation on the power of a tribunal "*to review or consider any decision or order … under this section"* was implicitly intended to establish some broader limitation on the power of the IRC, or an intention that, more broadly, that the Police Act would operate to the exclusion of the general provisions of the IR Act.

38. Similarly, the provisions dealing with imposition of "reviewable action" short of removal under s 173 in Division 1 of Part 9 with respect to misconduct or unsatisfactory performance provides no basis for an inference of a broader exclusion of the IRC's jurisdiction. Section 173(9) sets out a privative provision in similar terms to s 181D(7). Again, it is apparent that the intention of the legislature was only to confine the capacity of the Commission to *"review or consider any decision or order of the Commissioner"* under s 173 (albeit a specific merits review regime was then given to the Commission by Division 1A of Part 9).

39. It is unlikely that the legislature intended to implicitly interfere with the jurisdiction of the IRC more generally. The IR Act expressly applies the unfair dismissal regime to a *"public sector employee"*[38], and inclusively defines a public sector employee as *"an employee of a public authority and a member of the Public Service, the NSW Police Force, the NSW Health Service or the Teaching Service"*. Each of the Public Service,

[38] IR Act, s 83(1)(a).

the NSW Health Service, the Teaching Service, and the NSW Police Force are regulated by statute, and each empower removal on various grounds, including for medical incapacity.

40. Including a member of the NSW Police Force as one of the groups identified as a public sector employee to whom the unfair dismissal regime in Part 6 of Ch 2 is to apply, is merely the latest manifestation of the jurisdiction conferred on the IRC to hear and determine applications for reinstatement from dismissed police officers (and public servants, health service employees, and teachers) that has existed since 1976 and put beyond doubt by amendments made in 1978. If Parliament had intended to interfere with the jurisdiction of the IRC, the legislature could simply have said so, as it did as it has in s 173(7) and 181D(7) in a disciplinary context.

41. Moreover, the submission that the legislature intended the Police Act to be an exhaustive statement of the rights of a police officers with respect to appointment and removal, ignores other provisions of the Police Act and other statutes of the same legislature that afford police such rights. Section 85 of the Police Act provides the *"Commissioner is to be the employer of non-executive officers for the purposes of any proceedings relating to non-executive officers held before a competent tribunal having jurisdiction to deal with industrial matters"*. The "termination of employment of …any person or class of persons in any industry" is an "industrial matter".[39] As the plurality in *Eaton* accepted,[40] the IR Act applies generally to the Police Act and has application to industrial matters involving police.[41] The removal of a police officer is also potentially subject to relief under the *Anti-Discrimination Act* 1977,[42] the victimisation provisions of the IR Act[43] and through an application for reinstatement as an "injured worker".[44]

Second Supporting Contention

42. The second contextual point goes to purpose. The appellant contends, at [49] and [50], that the nature of the Police Act suggests that the legislature determined that the Commissioner of Police is best placed to determine whether a police officer is capable of performing his or her duties and that the special nature of police work provides

[39] IR Act, s 6(2)(e)
[40] Crennan, Kiefel and Bell JJ at [43] and [92]
[41] Crennan, Kiefel and Bell JJ at [81].
[42] *Anti-Discrimination Act* 1977, s 4B(1)(a), (2) and (3)(d).
[43] IR Act, ss 210 and 213.
[44] *Workers Compensation Act* 1987, ss 240-250.

"sound reasons" for Parliament to have decided that decision to retire police officers on medical grounds not be subject to review by the IRC. The submission involves an attempt to impose what the appellant thinks would be a sensible or convenient policy rather than to discern purpose from what the legislation actually says.[45]

43. No textual foundation is suggested for the assertion that Parliament intended medical retirement decisions of the Commissioner be insulated from review. The conferral on the Commissioner of responsibility for managing the functions and activities of the NSW Police Force aligns with the responsibilities conferred on the heads of other public sector departments and agencies.[46] The capacity of the Commissioner to direct a police officer to attend a medical assessment is also common to provisions applicable to other public sector employees.[47] The potential exposure to traumatic events is not unique to police work. The same can be said of firefighters, corrective services officers, ambulance paramedics, nurses and doctors within the emergency departments of public hospitals, and a range of other public sector employees.

44. Importantly, s 72A itself (and now s 94B) is indistinguishable from provisions permitting the medical retirement of other public sector employees.[48] Section 72A was enacted by the *Police Amendment Act* 2007, as part of a suite of amendments made to the Police Act "*arising out of a statutory review of the Police Act 1990*", that "*recommended that certain provisions of* [the Police] *Act be amended to align them with similar provisions in the Public Sector Employment and Management Act 2002…"*.[49] Upon the second reading of the *Police Amendment Bill* 2007, the then Minister observed that the new provision dealing with retirement on medical grounds *"will be consistent"* with the provisions applying in the public service.[50] Rather than indicating that Parliament regarded police as a special case warranting different treatment, s 72A was designed to provide consistency between the statutory schemes for police and the public sector generally. Tellingly, no equivalent to s 181D(7) was enacted, nor does such an equivalent exist in the public sector generally.

---

[45] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [28]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26].
[46] *Government Sector Employment Act* 2013, ss 25(1) and 30(1); *Teaching Service Act* 1980, s 6(1); *Health Services Act* 1997, ss 24(1) and 52B(1); *Fire and Rescue NSW Act* 1989, s 67.
[47] *Government Sector Employment Regulation* 2014, reg 15(2).
[48] *Government Sector Employment Act* 2013, s 56; *Teaching Service Act* 1980, s 76; *Transport Administration Act* 1988, s 68Q(3).
[49] Explanatory Note to the Police Amendment Act 2007.
[50] Hansard, Legislative Assembly, 17/12/2007 pg 3714.

Third Supporting Contention

45. The third contention raised by the appellant, at [51], is that as the decision to retire is made on objective medical grounds, that type of decision is contrasted with removal for loss of confidence under s 181D on the grounds of incompetence, misconduct, integrity or poor performance. The appellant contends that it would be anomalous for an officer dismissed on objective medical grounds to have greater rights in unfair dismissal proceedings to those dismissed for cause.

46. There are a number of difficulties with the submission. Firstly, s 181D provides the capacity for the Commissioner to remove an officer in whom he does not have confidence. The fact that such a decision is susceptible for review by the IRC on grounds that the removal was harsh, unreasonable or unjust is inconsistent with the view that Parliament intended decisions as to the composition of the Police Force be left entirely to the Commissioner. Even where the Commissioner does not have confidence in the suitability of an officer to continue in the Police Force, review and reinstatement (or reemployment) is available by the IRC.

47. Secondly, the submission proceeds from the premise that the question of whether an officer unfit to perform or incapable of discharging the duties of the officer's position will not be subject of controversy. There is no basis for that assumption. There is obvious potential for differing medical opinions as well as debate as to whether a particular medical condition is such as to cause the officer to be unfit to or incapable of discharging the duties of his or her position. In his application to the IRC, Mr Cottle contends that the Commissioner had *"no medical evidence to support the medical discharge"*.[51] In the context of unfair dismissal proceedings, one of the matters the IRC is empowered to consider is whether the dismissal had a basis in fact for the purposes of s 88(b) of the IR Act in order to resolve such a controversy.

Fourth Supporting Contention

48. The appellant's fourth contention, at [52] of his submissions, is that the Court of Appeal's emphasis on the unfettered nature of s 80(3) in contrast to s 72A fails to appreciate that the power in s 72A is unfettered once the medical preconditions are

[51] *Cottle v Commissioner of Police* [2017] NSWIRComm 1055 at [4].

met. The submission implicitly acknowledges that the power in s 72A is not unfettered. This stands in contrast to the power to dismiss a probationary officer in s 80(3), which was subject of consideration in *Eaton*. It was the fact that a probationary police officer could be removed at any time and without giving reason which was found "*implies an unfettered power*" to dismiss.[52] Heydon J, similarly, observed there were *"Three key aspects of the language*" with which s 80(3) was drafted that pointed "*against the conferral of any jurisdiction on the Commission...*". Those three aspects were *"at any time", "without giving any reason"* and "*probationary*".[53]

49. Unlike s 80(3) of the Police Act, s 72A does not confer an unfettered power. Section 72A (unlike s 80(3)) is expressly confined in its operation as to the reason or grounds upon which a police officer may be medically retired. There must be "*medical grounds*", namely, that the officer was *"unfit to perform or incapable of discharging the duties of the person's position",* and that such unfitness or incapacity did not arise from the person's misconduct or from causes within the person's control. That unfitness or incapacity has to appear *"likely to be of a permanent nature"*. To suggest that, once the preconditions are met, the discretion is unfettered, does not advance the submission. Any discretionary power fettered by conditions or limitations will appear unfettered once those conditions or limitations are met.

Fifth Supporting Contention

50. The appellant then contends, at [53], that, as the decision is discretionary, there is no duty on the Commissioner to give reasons in contrast to the requirement in the event of removal under s181D and that the absence of a requirement to provide reasons was considered, in *Eaton*, to weigh against a finding that the IR Act applied.

51. Whilst s 72A does not expressly require the Commissioner to give reasons, unlike s 80(3), it does not specifically state that he need not. It was the fact that the power to dismiss a probationer was conferred "*at any time and without giving any reason*" that suggested s 80(3) *"covey*[ed] *more than that the Commissioner may dismiss without giving reasons"* and "*implies an unfettered power and therefore that the decision is not to be subject to a review on the merits*".[54] In contrast, s 72A only empowers the removal of an officer for a single reason, namely, on medical grounds. There must be

[52] Crennan, Kiefel and Bell JJ at [74].
[53] Heydon J at [11]-[12].
[54] Crennan, Kiefel and Bell JJ at [90].

a reason capable of examination by the IRC, namely, unfitness or incapacity on the part of the officer.

52. As the appellant acknowledges, removal of an officer under s 72A will, at least in a practical sense, require the existence of a medical report in which it has been found that the officer is unfit or incapable. The requirement for a report finding that the officer is unfit or incapable of discharging the duties of his or her position, means both that the officer will inevitably be aware that the question of his or her fitness is under consideration and provides a basis upon which the IRC can conduct its review. The absence of an express requirement on the Commissioner to provide reasons is not, in this context, inconsistent with review by the IRC.

Sixth Supporting Contention

53. The sixth contention advanced by the appellant, at [55], is that the dismissal of a police officer found to be medically unfit leaves little room for a finding of unfairness. As has been observed, the submission assumes that there will be no controversy as to the medical opinion or the implications of a particular illness or injury. Furthermore, the appellant does not cavil with the reasoning of the Court of Appeal that the decision to dismiss under s72A is attended with a number of non-medical assessments (CA [71]). The IRC is able to determine whether the officer is, in fact, permanently unfit or incapacitated and whether the decision of the Commissioner to retire the officer was otherwise unreasonable or unjust in light of his or her medical condition.

54. The assertion that the Commissions is *"best placed"* to make the relevant non-medical assessments does not identify as statutory basis for concluding that Parliament intended the Commissioner to make a determination under s 72A without recourse to the IRC being available. There is no reason to conclude Parliament did not believe the IRC to be an appropriate forum to review decisions of this type. The IRC is conferred with jurisdiction under Part 8 of the *Workers Compensation Act* 1987 with respect to reinstatement of injured workers, including determining whether the worker is fit for the kind of employment to which he or she seeks reinstatement.[55]

Seventh Supporting Contention

55. The appellant next raises, at [56], potential inconsistency between the remedies available under s 89 of the IR Act. It is asserted that reinstatement cannot be available

[55] *Workers Compensation Act* 1987, s 243(2).

to an officer who is medically unfit and re-employment undermines the Commissioner's ability to determine who should serve in the police force. Again, the submission assumes that it is, in all cases, uncontroversial that the officer is actually unfit to or incapable of discharging the duties of his or her position. If the IRC finds that the officer is not unfit or incapable to discharge the duties of his or her position, reinstatement is an appropriate remedy.

56. Furthermore, other remedies are available which make it practical and appropriate for the unfair dismissal provisions to apply even if reinstatement is not available. If it would be impracticable to reinstate an applicant, the Commission may order re-employment to another position (s 89(2)) or, if both reinstatement and re-employment are impracticable, award compensation (s 89(5)). An officer may be permanently unfit from discharging the duties of their "position" (for example, a general duties position), but not some different position within the NSW Police Force (for example, that of a police prosecutor or intelligence operative). In those circumstances, an order for re-employment may be appropriate. If the manner or timing of the officer's medical retirement caused unfairness, an award of compensation may be made.

Eighth Supporting Contention

57. The final supporting contention advanced by the appellant, at [57], is that administrative officers in the NSW Police Force fall under a different regime with respect to the management of unsatisfactory performance and misconduct and through appeal rights under Part 7 of Chapter 2 the IR Act. This is said to be an indicator that the legislature turned its mind to the circumstances in which members of the NSW Police Force are entitled to challenge employment decisions under the IR Act.

58. The submission overlooks that administrative employees of the NSW Police Force also have access to the general jurisdiction of the IRC, including the unfair dismissal jurisdiction in Part 6 of Chapter 2 of the IR Act. Whilst administrative employees of NSW Police Force (like other public servants) are entitled to bring disciplinary appeals under Part 7 of Chapter 2, those provisions do not derogate from or otherwise affects any right of appeal or other proceedings which are available.[56]

59. The appellant does not suggest that an administrative employee of the NSW Police Force could not, like other public sector employees, bring unfair dismissal proceedings if medically retired under s 56 of the *Government Sector Employment Act* 2013. The

[56] IR Act, s 99(1).

conclusion contended for is that police officers retired under s 72A are denied access to an unfair dismissal remedy, but administrative employees retired under an identical provision have access to the IRC.

Sections 85 and 218 of the Police Act

60. The appellant's submissions at [58]-[62] fail to come to grips with the import of *Eaton*, namely, that the IR Act has general application to industrial matters involving police officers.[57] Section 130 of the IR Act enables an industrial dispute to be notified the IRC for the purpose of having it resolve the dispute. An "industrial dispute" is defined[58] to mean *"…a dispute (including a question or difficulty) about an industrial matter"*. An "industrial matter" is defined in s 6 to mean "*matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry"*, a specific example of such a matter being "*the termination of employment of (or the refusal to employ) any person or class of persons in any industry*".[59]

61. Once notified, an industrial dispute is to be the subject of a compulsory conference (s 132) and attempts must be made to resolve it by conciliation (s 133-134). If not resolved, the Commission is empowered arbitrate and to *"make a recommendation or give a direction to the parties", "make or vary an award under Part 1 of Chapter 2", "make a dispute Order under Part 2",* or "*make any other kind of order it is authorised to make (including an order made on an interim basis)*".[60] Dispute orders specifically include in s 137(1)(b) and (c), reinstatement, re-employment or and order not to dismiss an employee and, in any event, Part 6 of Chapter 2 *"applies"*.[61]

62. The point being made by the plurality was not 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 to dismissal under s 80(3) of the Police Act".* The plurality's discussion at [90] and [91] emphasised that s 80(3), like the *"provisions of Part 9 of the Police Act"* referred to in the first sentence of [90], created a specific inconsistency which cut away from the general preservation of the IRC's jurisdiction by s 218. The Court of Appeal did not, as suggested by the appellant at [59], limit itself to a search

[57] Crennan, Kiefel and Bell JJ at [43], [81] and [90].
[58] Section 4, and Dictionary to the IR Act.
[59] IR Act, s 6(2)(e).
[60] IR Act, s 136(1)(a)-(d).
[61] IR Act, s 83(4); *Police Association of NSW v NSW Police (No.3)* (2005) 144 IR 150 at [59].

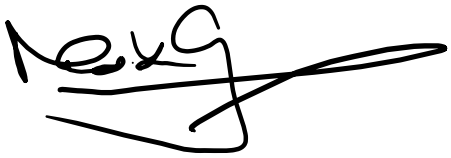
for express inconsistency. The Court correctly asked whether there was *"any statutory indication"* which warranted construing s 218 as inconsistent with other provisions of the Police Act and concluded there was none (CA [69]).

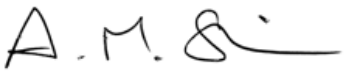
63. In any event, s 218 is not to be disregarded in interpreting the Act. Section 218 is, at the very least, a further indication that the Police Act was not intended to repeal or alter the operation of the IR Act except to the extent that it expressly does so, or some specific inconsistency arises. For the reasons outlined above, the reasoning from *Eaton* in relation to s 80(3) does not support the same conclusion being reached with respect to s 72A. More generally, the discussion in *Eaton* at [90]-[91], and the conclusion reached about the operation of s 218, do not support the contention that Police Act was intended to create an exhaustive and exclusive code with respect to police officers, including their dismissal or removal.

PART V ESTIMATE OF ORAL ARGUMENT

64. If leave to intervene is given, the Police Association would require 30 minutes to present its oral argument.

12 July 2021





M Gibian

H B Higgins Chambers

Tel: (02) 9223 3633

gibian@hbhiggins.com.au

A M Slevin

H B Higgins Chambers

Tel: (02) 9223 3633

slevin@hbhiggins.com.au

Annexure to the (Proposed) Intervener's Written Submissions – Legislative Provisions

Legislative provision
Industrial Relations Act 1996 (as at date Cottle filed his application for relief from unfair dismissal, being 14/12/2016), Part 6 of Chapter 2 generally, s 6 definition of "industrial matter", s 4 and Dictionary definition of "industrial dispute", "public sector employee", Parts 1 and 2 of Chapter 3 Industrial Disputes (and in particular s 130, 136 and 137), s 405.
Police Act 1990 (as at date Cottle filed his application for relief from unfair dismissal, being 14/12/2016), s 5 composition of the NSW Police Force, s 85, s 72A, Part 9 Divisions 1, 1A, 1B, 1C, and 1D generally, s 218. Also, in its current form, *Police Act* 1990 s 94B
Industrial Arbitration (Police) Amendment Act 1946, s 5 (reference to "employees employed under the Police Regulation Act 1899" in definition of "Employees of the Crown")
Extracts of the report of Sir Alexander Beattie, December 1974, para 19.2-193 and 19.11-19.12
Industrial Arbitration (Amendment) Act 1976, amendments to ss 5 and 20
Second reading of the Bill that gave rise to the *Industrial Arbitration (Amendment)* Act 1976, *Hansard*, Legislative Assembly, 14 September 1976, pg 827-828
Industrial Arbitration (Reinstatement Awards) Amendment Act 1978, ss 20(1A), 20A
Second Reading of the Bill that gave rise to the *Industrial Arbitration (Reinstatement Awards) Amendment Act* 1978, *Hansard*, Legislative Assembly, 15 November 1978, pg 387-389
Second Reading of the Bill that gave rise to the *Government and Related Employees Tribunal Act*, *Hansard*, Legislative Assembly, 20 February 1980, pg 4551
Industrial Arbitration (Unfair Dismissal) Amendment Act 1991, s 91ZC
Industrial Relations Act 1991, ss 4 and 5 (the definition of "employee of the Crown"), 245-255, 349 as made
Police Service (Complaints, Discipline and Appeals) Amendment Act 1993, ss 173-182
Police Service Amendment Act 1995, s 181B
Police Legislation Further Amendment Act 1996, s 181D
Second Reading of the Bill that gave rise to the *Police Legislation Further Amendment Act* 1996, *Hansard*, Legislative Assembly, 13 November 1996 pg 5909
Police Service Amendment Act 1997, s 181E-181K
Second Reading of the Bill that gave rise to the *Police Legislation Amendment Act* 1997, *Hansard*, Legislative Assembly, 18 June 1997, pg 10563
Police Service Amendment (Complaints and Management Reform) Act 1998, s 173-181
Workers Compensation Act 1987, s 3(5), 6, Part 8
Anti-Discrimination Act 1977, s 4B, Part 4A Discrimination on the ground of disability