HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

NSW Commissioner of Police
Appellant

Trevor Cottle
First Respondent

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Industrial Relations Commission of New South Wales
Second Respondent

REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet. They adopt the terms defined in the Appellant's submissions filed on 1 June 2021 (**AS**).

PART II: RESPONSE TO FIRST RESPONDENT'S SUBMISSIONS

2. Contrary to the submissions of Mr Cottle (**RS**) at [12]-[13] and the first-numbered [37(i)], s 72A of the *Police Act* does not provide the Commissioner with a "broad discretion" in
20 determining that the preconditions have been met, in the sense of having some normative latitude as to the choice to be made.[1] Rather, the preconditions in s 72A are expressed as statutory criteria going to issues of fact and evaluation, and implicitly require a medical report to support the finding: see AS [51].

3. As to RS [15], Mr Cottle accepts the point at AS [29] that there is some potential overlap between a removal under s 181D and a medical retirement under s 72A, but he contends this supports his case. Not so – review of a s 181D decision is a carefully drawn, attenuated form of review compared to the IRC's general unfair dismissal jurisdiction. As put at AS [51], it is understandable that some review is available for such decisions, given the greater potential to place a stain on the professional and personal reputation of a police
30 officer than is involved in a medical retirement. For this reason, too, there is no anomaly in the conclusion reached by the primary judge: cf RS [28] and [34].

4. Contrary to RS [17]-[18], none of the cases relied upon by the Court of Appeal and cited by Mr Cottle concern the construction of two statutes with an overlapping field of

[1] Cf *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204–5 [19]-[21] per Gleeson CJ, Gaudron and Hayne JJ, referring to *Jago v District Court (NSW)* (1989) 168 CLR 23, 76 per Gaudron J.

operation. The Court of Appeal founded its consideration on the assumption that Parliament would not have intended "that the important statutory right conferred on public sector employees" would have been removed by the *Police Act*: CA [70]. For the reasons set out at AS [35]-[38], this incorrect starting point misdirected the Court of Appeal in its task of construction as to a harmonious operation of the competing statutory schemes.

5. Contrary to RS [19], s 85 of the *Police Act* does not operate to treat police officers in the same manner as other public sector employees. The section provides that, where the IRC has jurisdiction, the Commissioner will be deemed as the relevant employer, even though it is not strictly an employment relationship (see AS [14]). The provision, like a number of provisions relating to other parts of the NSW Government,[2] also serves the role of delineating who is the appropriate respondent in any relevant proceedings – namely, the Commissioner, as opposed to say the State or the NSW Police Force. What s 85 does not do is confer any particular jurisdiction on the IRC.

6. The definitional provisions referred to at RS [20] are general provisions, in circumstances where there is no dispute that many aspects of the *IR Act* do apply to police officers (see AS [62]). Such general definitions do not answer the question of whether s 84(1) of the *IR Act* applies to medical retirements under s 72A of the *Police Act*. That extension of the definition of employee to include police officers also applied in *Eaton*,[3] as well as in the equivalent provisions considered in *Ferdinands*,[4] yet this Court did not find this conclusive in determining whether police officers could bring an unfair dismissal claim.

7. As for s 405(1) of the *IR Act*, invoked at RS [20], it does nothing to illuminate what happens where there is a conflict between the *Police Act* and the *IR Act* regarding the dismissal of a police officer. The section is directed to resolving inconsistencies between IRC orders and the Commissioner's functions with respect to a limited range of matters, namely, promotion or transfer of police officers or police officers who are hurt on duty. To the extent that s 405(3) assumes any jurisdiction under Ch 2 Pt 6 of the *IR Act*, that could apply

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[2] eg The Industrial Relations Secretary is treated as the employer for public sector employees employed under the *Government Sector Employment Act 2013* (NSW), see s 21(1) of that Act; the Education Secretary in respect of the Teaching Service: *Teaching Service Act 1980* (NSW), s 12; the Health Secretary in respect of the NSW Health Service and its Local Health Districts: *Health Services Act 1997* (NSW), s 116H; and the Transport Secretary in respect of employees of Transport for New South Wales: *Transport Administration Act 1988* (NSW), s 68K.

[3] *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [7] per Heydon J; at [40] per Crennan, Kiefel and Bell JJ.

[4] *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [30]-[32] per Gummow and Hayne JJ, at [161] per Callinan J.

to review of dismissals under s 181D. In *Eaton*, the plurality indicated at [81] that s 405 "is not helpful in answering the question" at issue there (see similarly Heydon J at [36]). So, too, here. It is notable that the Court of Appeal did not rely on it.

8. As to RS [22]-[27], the majority in *Eaton* found that Pt 6 of Ch 2 of the *IR Act* did not apply to the dismissal of probationary police officers not just by reference to the language of s 80(3) but also the features of the overall statutory scheme set out at AS [42].

9. As to RS [29]-[32], *Ferdinands* and *Eaton* found the "inconsistency" between the general industrial relations legislation and the specific police legislation to be a principal factor in discerning Parliamentary intention that police officers did not have the right to bring an unfair dismissal claim in relation to their specific dismissals. In *Ferdinands*, the *Police Act 1998* (SA) did not contain an equivalent to s 218(1) of the *Police Act* to avoid implied repeal: see AS [59]. Yet, for much the same reasons as in *Eaton*, the majority in *Ferdinands* determined that incompatibilities between certain key features of the South Australian police and industrial legislation to conclude that the two schemes could not be reconciled, and the contrariety was resolved by the principle of implied repeal. In *Eaton*, the majority pointed to similar inconsistences between the *Police Act* and the *IR Act* to reach the same conclusion by construing two competing statutory schemes harmoniously rather than by implied repeal: see AS [39]-[43].

10. Mr Cottle argues at RS [35] that the Appellant is guilty of imputing his own purpose to the statutory provisions. Not so; the Appellant's purposive arguments are founded on the unique functions and powers of police officers, as established by a combination of long-established common law doctrine and statutory provisions: see AS [14], [16]-[19], [49].

11. As to the second-numbered RS [37(i)], an application made under Pt 8 of the *Workers Compensation Act 1987* (NSW) (**WC Act**) does not involve a review (of the merits or otherwise) of the Commissioner's decision to retire the officer on medical grounds (unlike claims made under Pt 6 of Ch 2 of the IR Act). Part 8 of the *WC Act* is part of a separate, distinct and complex statutory regime directed to encouraging injured workers, who have been dismissed from their employment because they are not fit for employment as a result of an injury received in the course of employment, to be rehabilitated in order to return to work. Thus, the IRC's inquiry is prospective in nature, examining whether a police officer is fit to return to duty, and does not involve a historical inquiry into the reasons or circumstances of dismissal. By contrast, an unfair dismissal claim involves a merits review of the dismissal decision by reference to past events in determining whether a dismissal

was harsh, unjust or unreasonable.

12. The IRC also does not have the power to determine if a police officer is "hurt on duty" under the historical pension scheme, nor does it any longer have jurisdiction to determine superannuation appeals. The IRC has jurisdiction only to review a decision of the Commissioner to grant or refuse leave of absence on full pay to a police officer during an absence where they are hurt on duty: *Police Act*, s 186. All substantive matters pertaining to determining whether a police officer covered by the historical scheme was "hurt on duty" are dealt with in the District Court's residual jurisdiction.[5] Since December 2016, appeals under the *Superannuation Administration Act 1996* (NSW) have been assigned to the Supreme Court of NSW rather than the IRC.[6]

13. As to RS [37(iii)], no authority is cited for the proposition that there is an implied legal obligation for the Appellant to give reasons for a medical retirement. There is none.[7]

14. As to RS [39], if a police officer was not, in fact, properly determined to meet the statutory preconditions in s 72A, then the retired police officer would have potential remedies available for judicial review, such as improper purpose, bad faith or irrationality.

POLICE ASSOCIATION'S SUBMISSIONS

15. The Police Association of New South Wales (**PANSW**) should be refused leave to intervene: cf its submissions (**PAS**), [4]-[7]. The PANSW makes substantially the same submissions as Mr Cottle, other than by its lengthy and substantially irrelevant recitation of statutory history (see [16] below). There is thus limited utility in the PANSW being involved, and such involvement would come at the price of increased hearing time and costs. The PANSW is not a person directly affected by the decision. PANSW did not lodge an application on Mr Cottle's behalf before the IRC, and had not participated till its rejected attempt to appeal below: see CA [16]-[19]. Leave to intervene will not ordinarily be granted if a non-party's interests are merely the potential that a decision may establish a precedent which may adversely impact upon future or prospective litigation.[8] If PANSW

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[5] *Police Regulation (Superannuation) Act 1906* (NSW), s 21; *District Court Act 1973* (NSW), s 142G(c).

[6] *Superannuation Administration Act* 1996 (NSW), s 88. The amending legislation was Sch 2, cl 2.33 of the *Industrial Relations Amendment (Industrial Court) Act* 2016 (NSW), which took effect on 8 December 2016, when the IRC's jurisdiction was amended to remove its ability to sit in Court Session. Prior to that, the IRC had jurisdiction to hear such appeals when sitting in Court Session pursuant to s 153(1)(h) of the *IR Act*.

[7] Cf *Public Service Board v Osmond* (1986) 159 CLR 656 at 662-665 per Gibbs CJ; 676 per Brennan J.

[8] *Roadshow Films Pty Ltd v iiNet Limited (No 1)* (2011) 248 CLR 37 at [2]; *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [23] per Gleeson CJ.

is granted leave, this should be limited to its written submission and on the condition that it not seek costs from the parties.[9]

16. In case leave is granted, the Appellant makes the following brief responses. As to PAS [15]-[33], as the plurality identified in *Eaton* (at [49]), the statutory history of the *Police Act* and the *IR Act* does not provide any real guidance on the interrelationship between the *Police Act* and the *IR Act*. It is apparent that the *Police Act* and its predecessors have undergone significant, albeit piecemeal, reform over time and the mechanisms for review have centred on appointment and disciplinary appeals. None of the provisions have addressed the availability of a merit review of the medical retirement decisions. Thus not much can be gained by seeking to trace any historical continuity or discontinuity in approach in relation to medical retirements from earlier statutory provisions.

17. As to PAS [43], it may be accepted that the potential to exposure for traumatic events is not limited to police officers. However, the chances of exposure to such stressors in the course of police work are much greater, and the dangers involved are amplified, in circumstances where police officers are empowered to use firearms and other weapons,[10] unlike other public workers.

18. As to PAS [57], the fact that administrative employees of the NSW Police Force can make an unfair dismissal claim if medically retired, and police officers cannot do so, merely underscores the differences in the nature of their functions and the context in which they perform their duties. Administrative employees have their employment regulated in part under Pt 6A of the *Police Act* and in part under the *Government Sector Employment Act 2013* (NSW) applicable to public servants: see *Police Act*, ss 81F and 93A. Police officers have their appointment and removal governed solely by the *Police Act*.

20 July 2021

J K Kirk
Eleven Wentworth
T: (02) 9223 9477
kirk@elevenwentworth.com

Michael Seck
Six St James Hall
T: (02) 9236 8612
mseck@stjames.net.au

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[9] Note *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 at [3].

[10] *Firearms Act 1996* (NSW), ss 6(2)(a), 6(2)(ai) and 6(3)(c); *Weapons Prohibition Act 1998* (NSW), s 6(2).

Annexure to the Appellant's Reply – Legislative Provisions

Legislative provision	As in force at	Page
Police Act 1990 (NSW) s. 72A	14 December 2016	1
Industrial Relations Act 1996 (NSW) s. 84	14 December 2016	2
Police Act 1990 (NSW)	14 December 2016	2
Industrial Relations Act 1996 (NSW) Part 6 of Chapter 2, ss. 83-90B s. 405	14 December 2016	2
Industrial Relations Act 1996 (NSW)	14 December 2016	2
Police Act 1998 (SA)	22 November 2001	3
Workers Compensation Act 1987 (NSW) Part 8	14 December 2016	3
Superannuation Administration Act 1996 (NSW) s. 88	14 December 2016	4
Police Regulation (Superannuation) Act 1906 (NSW), s 21	14 December 2016	4
District Court Act 1973 (NSW), s 142G(c).	14 December 2016	4
Industrial Relations Amendment (Industrial Court) Act 2016 (NSW)	8 December 2016	4
Firearms Act 1996 (NSW), ss 6(2)(a), 6(2)(ai) and 6(3)(c)	14 December 2016	5
Weapons Prohibition Act 1998 (NSW), s 6(2)	14 December 2016	5
Government Sector Employment Act 2013 (NSW)	14 December 2016	5
Police Act 1990 (NSW) ss 81F, 93A	14 December 2016	5