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 S56/2021

NSW COMMISSIONER OF POLICE
Appellant

and

TREVOR COTTLE
First Respondent

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES
Second Respondent

FIRST RESPONDENT'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

2. The First Respondent agrees with and adopts the Appellant's statement.

Part III: SECTION 78B

3. The First Respondent considers that no notices are required under Section 78B of the *Judiciary Act 1903*.

Part IV: FACTS

4. The First Respondent accepts the summary of material facts set out in the appellant's narrative of facts and chronology.

5. The First Respondent is a former non-executive NSW Police Officer who joined the Police Force in December 2002, and was discharged effective from 15 December 2016 pursuant to the former Section 72A of the Police Act 1990 (NSW).

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6. By letter dated 1 December 2016[1] to the First Respondent, he was advised by the Appellant's Medical Discharge Unit that he was to be medically discharged with such discharge taking effect as from 15 December 2016. This medical discharge was pursuant to the Commissioner's power to do so under Section 72A of the Police Act.

7. The First Respondent filed a claim in the IRC of NSW pursuant to Section 84 of the Industrial Relations Act 1996 (NSW) ("the IR Act") seeking relief for Unfair Dismissal[2]. The reasons articulated by the First Respondent in his "Application for

20 Relief in Relation to Unfair Dismissal" were briefly stated as[3]:

> "*1) The Employer has No medical evidence to support the Medical Discharge and their current position.*
>
> *2) They were informed to Transfer the employee, to another LAC to resolve the matter. The employer refused that request and has ignored the doctor's expert opinion."*

8. The Appellant filed a Motion in the IRC of NSW seeking to strike out the First Respondent's unfair dismissal claim for want of jurisdiction, which dispute has ultimately brought that matter to the instant appeal.

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[1] Appellant's Book of Further Materials at [14]
[2] See Appellant's Book of Further Materials at [4] to [16]
[3] See Appellant's Book of Further Materials at [11]

9. It was common ground before the IRC and before both the Primary Judge and the Court of Appeal below that a medical discharge of a police officer pursuant to Section 72A of the Police Act constitutes a "dismissal".

Part V: ARGUMENT

10. The statutory framework under consideration is set out at [25] to [47] of the Judgment below, and does not require repeating here. These provisions are discussed at [11] to [29] of the Appellant's submissions, to which the following selective replies and comments are addressed.

11. Section 72A (as it stood at the time) provided as follows:

> 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.

12. At [23] of its submissions, the Appellant states that "[O]nce the preconditions in s 72A of the Police Act are met, the Commissioner has a discretion to exercise the power." This statement does not accurately summarise the process. The Commissioner's discretion does not commence "once the pre-conditions are met" but extends to determining *whether* the pre-conditions are met. Thus, for example, there may be equivocal or competing medical opinions as to whether the officer is unfit to discharge their duties, and as to whether that incapacity is likely to be permanent.

13. At [71] below, 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.

14. At [29] of its submissions, the Appellant proposes that there may be some element of 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.

15. The First Respondent accepts the Appellant's assertion that "…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." This observation leads to a number of consequential propositions. Firstly, if the Appellant's asserted interpretation of the legislation under review is found to be correct, then some medical discharges will attract a "merits review" before the IRC, whist others will not. Secondly, those medical discharge dismissals that do not attract a right to seek a merits review before the IRC will be those where the officer in question has been blameless in their conduct. In this regard, it is observed that s 72A in its terms cannot apply to a dismissal that has not arisen from actual misconduct on the part of the officer, or from causes within the officer's control.

16. Section 72A is clearly not a provision that deals with discipline, as it can only be engaged when the officer is entirely blameless, in the sense that the officer's apparent unfitness or incapacity to discharge police duties has not arisen from misconduct or causes within the officer's control.

17. At [35] to [36] of its submissions, the Appellant seeks to frame the reasoning of the Court of Appeal as an application of the principle of construction this Court identified in ***Owners of "Shin Kobe Maru" v Empire Shipping Co Inc***; "[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". ***Shin Kobe Maru*** is not referred to or applied by the Court of Appeal. Rather, the Court of Appeal start with the proposition that the proper approach to the task of statutory interpretation is the precise terms of the statute or statutes, that fall to be construed[4]. The Court of Appeal approached the task of construing the two statutes, with express reference to, and by the application of, the principles discussed in ***Marshall v Director General, Dept of Transport***, ***Walker Corporation Ltd v Sydney Harbour Foreshore Auathority***, ***Baini v R***, ***Federal Commnr of Taxation v Consolidated Media Holdings Ltd***, and ***Alcan (NT) Alumina Pty Ltd v Commnr of Territory Revenue***.[5]

18. 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.

19. As the Court of Appeal notes, 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[6]. Noting, as the High Court did 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.

20. From the Court of Appeal's summary of the overlapping statuary framework[7], 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

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[4] *Cottle v NSW Commnr of Police; Police Association of NSW v Commnr of Police (NSW Police Force)* [2020] NSWCA 159 at eg [58]-[59]
[5] Ibid.
[6] at [62]
[7] at [27] to [47]

"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[8], 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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21. The plurality in ***Eaton*** discussed s 405 and s. 405(3) of the IR Act and accepted[9] 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 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."

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22. 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.

23. As this 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

30 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

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[8] at [30]
[9] at [81]

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* ."[10] 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[11].

10 24. 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 indication[12].

25. The Court of Appeal asked itself the same question that was addressed by the plurality in ***Eaton***, by considering whether there were here any special and inconsistent terms of the Police Act which led to the conclusion that the general provisions of the IR Act do not apply, and found none.

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26. The present case is readily distinguishable from ***Eaton***. Here there are no special and inconsistent terms in the Police Act. Rather, a police officer who is "dismissed" pursuant to s 72A has no recourse to the review procedures referred to in Section 181E, nor are there any special provisions (such as s.80(3) as applied in ***Eaton)*** which signal a legislative intention that there be an unfettered right in the employer to dismiss. So much was observed by the Court of Appeal[13].

27. Important to the ultimate conclusions of the High Court in ***Eaton*** was the fact that the wording of s.80(3) of the Police Act strongly suggested an unfettered right to

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[10] Eaton at [91]
[11] *Eaton* at [92]
[12] at [69]
[13] See eg [71] and [72]

dismiss a probationary constable, such that finding that an unfair dismissal claim was available under s.84 IR Act would be significantly inconsistent.[14]

28. In the instant case there is no such inconsistency or anomaly. Indeed, judged from the perspective of a presumption that the different statutes of the same legislature operate in harmony[15], and gleaning a construction by reference to legislative intention extracted 'from all available indications"[16], it would be anomalous if an officer dismissed under s.181D had a merits review (S.181E) but an officer dismissed pursuant to the provisions of 72A had no such merits review. This point is made by the Full Bench at [79] wherein it is observed that if the interpretation argued for by the Plaintiff was correct, "…*a confirmed officer who has done nothing wrong would be in a worse position than one who has been found to have been guilty of misconduct or poor performance such as to have lost the confidence of the respondent*."

29. At [39] & [40] of its submissions, the Appellant seeks to draw an analogy with ***Ferdinand v Commnr for Public Employment***[17] to argue to the effect that some general inconsistency arises due to the appearance of exhaustiveness of the regime of merit review in the IR Act. The Appellant complains that ***Ferdinand*** is not referred to. ***Ferdinand*** can be distinguished from ***Eaton***. This Court did not decide ***Eaton*** on the basis of simply applying the decision in ***Ferdinand***, as the South Australian Legislation under consideration was quite different to the equivalent legislation in NSW[18].

30. ***Ferdinand*** relates to the S.A. legislation. There was found to be an elaborate system of merits review of decisions relating to transfer, promotion, termination on certain grounds, and discipline. There was established under the SA Police Act a separate Police Tribunal, however, the S.A. Police Act reserves to the Commissioner the power to decide whether the appointment of a member of the police force should be terminated following a conviction. The arrangements for

[14] see Eaton at eg paras [74] & [75] and see also Heydon J at [17]
[15] Eaton at [78]
[16] Eaton at [46]
[17] (2006) 225 CLR 130
[18] Eaton at [47]

control and management of the police force, and for merits review of some kinds of decision by the Commissioner, and the absence of merits review of others were found to be exhaustive.

31. As the plurality noted in ***Eaton***[19], in ***Ferdinand***, inconsistency was at the root of the identified principle of implied repeal. This is true also where the question is one of possible amendment where a later statute is said to operate upon an earlier statute. The law presumes that statutes do not contradict one another. The question is not whether one law prevails, but whether that presumption is displaced. Deciding whether the two statutes could not "stand or live together" in the relevant respect "requires the construction of, and close attention to, the particular provisions in question". Unlike ***Ferdinands***, in ***Eaton*** the plurality concluded[20] that the NSW IR Act may apply generally to the NSW Police Act but not where the operation of the former produces an internal inconsistency in the latter.

32. The difficulty with the propositions put by the Appellant at [42] is that they endeavour to persuade the Court that the Police Act ought to be viewed in effect as a code for the removal or police officers in NSW. At no point in ***Eaton*** is it suggested that the Police Act constitutes an "exclusive code" for all dismissal cases brought by former Police Officers. On the contrary, the High Court 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.[21]" The position proffered by the Appellant to the effect that the Police Act ought to be accepted as an "exhaustive code" in dealing with the removal of police officers is untenable.

33. At [48] the Appellant submits the Court of Appeal erred in that it "assumed what it sought to establish" contrary to the principle that 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"[22]. This criticism does

[19] Eaton at [48]
[20] Eaton at [92]
[21] Eaton at [91]
[22] quoting from *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])

not bear scrutiny. The Court of Appeal did not "implicitly assumed that there is a desirable policy for police officers to have access to a merits review….". Rather the Court of Appeal found that:

i. there was no internal inconsistency in applying 218 of the Police Act in its terms to an officer medically discharged under s 72A of the Police Act[23];

ii. nor any external inconsistency in applying the Pt 6 unfair dismissal provisions of the IR Act to an officer medically discharged under s 72A of the Police Act[24];

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34. Thereafter the Court of Appeal noted in express response to an argument put on behalf of the Commission of Police below to the effect that the Police Act covered the field for removal of police officers, that the Police Act does by virtue of s 181D and s 181E grant the IRC a role in the case of dismissal for cause, by reference to the same criteria – "harsh, unreasonable or unjust" – as appears in s 84 of the IR Act, albeit with some statutory modification that may well reflect the special character of the police force. However, the Police Act clearly does leave scope for review by the IRC of dismissal of police officers for cause, and to apply to those cases much of the unfair dismissal regime in the IR Act. It is in this context,

20 answering a submission put by the Commissioner of Police, that the Court of Appeal observes[25]:

> "Whilst the absence of such review for dismissal of probationary constables may be explicable in part by reference to their limited and contingent membership of the police force, 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. The position is *a fortiori* when it is recalled that a s 72A dismissal may only take place where the police officer has been innocent of any

30 actual misconduct, or has not been responsible for his or her unfitness or incapacity: see *Police Act* s 72A(b)(ii), extracted at [4] above. If, as the Police

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[23] Eaton at [69]
[24] Eaton at [70]
[25] At [76]

Commissioner submitted, this results in a "superior" right of review for such an officer, as opposed to that available to an officer dismissed for cause pursuant to s 181D, that is not a surprising or irrational matter."

35. It is, with respect, faintly ironic that the Appellant accuses the Court of Appeal of breaching the principle laid down in ***Australian Education Union v Department of Education and Children's Services***[26] by constructing its own idea of a desirable policy, imputing it to the legislature, and then characterising it as a statutory purpose, when a great deal of its written submissions entreats this Court to follow such a course. Paras [49] and [50] espouse policy reasons why the Commissioner's preferred interpretation of the legislation ought to find favour.

36. At [50] to [55] of the Appellant's submissions, it is put that 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" and that a removal pursuant to s 72A would be "on objective grounds for medical unfitness or incapacity". The submission continues, suggesting the power in s 72A depends upon the satisfaction of certain necessary preconditions of unfitness and permanency, which are essentially of a medical kind, and that 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.

37. There are a number of flaws in the above analysis:

i. Firstly, as noted above, the Police Commissioner's discretion does not commence "once the pre-conditions are met" but extends to determining whether the pre-conditions are met. Thus, for example, there may be equivocal or competing medical opinions as to whether the officer is unfit to discharge their duties, and as to whether that incapacity is likely to be permanent. As the Court of Appeal noted[27], s 72A requires far more than a medical assessment, but rather it requires a number

[26] Opp cit
[27] at [71]

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, and then an ultimate discretion as to whether or not to cause the officer to retire.

The suggestion by the Appellant that the act of "causing an offer to be retired" pursuant to Section 72A was merely an acceptance of a series of preconditions of a medical kind, rather downplays the role of the Commissioner's discretion. The criteria in s.72A that enliven the power to dismiss an officer (by forced medical retirement) are quite vague and open to interpretation. Phrases like "found on medical grounds to be unfit" and "appears likely to be of a permanent nature" demonstrate that the Commissioner has a broad discretion that includes assessing and determining whether the preconditions are met.

i. Secondly, under s 242 of the Workers Compensation Act 1987 (NSW) ("WCA"), a police officer forced into retirement pursuant to s 72A because of work injury can bring a claim in the IRC within 2 years seeking re-instatement. Thus, it has never been in question that *some* Section 72A medical dismissals can be reviewed by the IRC[28]. The IRC routinely deals with cases that involve resolving competing medical opinions, including but not limited to those involving police officers, for example disputes under s 242 WCA, and under the former police pension scheme as to whether or not an office is "hurt on duty" pursuant to the Police Regulation (Superannuation) Act 1906 (NSW), and superannuation appeals under the Superannuation Administration Act 1996 (NSW)[29].

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[28] This was referred at [9] of the Court of Appeal's reasons quoting from the decision of the Full Bench of the IRC

[29] For an illustrative example of a s.242 WCA appeal before the IRC, see eg ***Lorelle Hillman v NSW Trains*** [2017] NSWIRComm 1056; for an illustrative example of a "hurt of duty" appeal before the IRC see eg ***Tysoe v Commissioner of Police*** [2017] NSWIRComm 1002; for an illustrative example of a superannuation appeal before the IRC, see eg ***Cook v SAS Trustee Corporation*** [2014] NSWIRComm 43.

ii. Thirdly, some medical retirements may inevitably be subject to a 181D merits review in the IRC, as conceded by the Appellant in its submissions and as discussed above. Thus it cannot be inferred that Parliament intended the Commissioner's powers to medically retire would not be "second guessed" in a merits review before the IRC.

iii. Fourthly, the power to medically retire a police officer pursuant to s 72A is not subject to the same statutory provision that accompanies the right to dismiss a probationary constable pursuant to s 80(3), ie "at any time and without giving any reason". Thus, whilst there is no express obligation for the Commissioner to give reasons for a medical retirement pursuant to s 72A, there would be at least an implied administrative law obligation to give some reasons. Even if that were not the case, this is not an impediment to the Part 6 of Ch 2 unfair dismissal provisions of the IR Act applying. Those provisions expressly accommodate the possibility that no reasons may have been given for a dismissal[30]. Further, in any dismissal by forced medical retirement pursuant to s.72A there are detailed statutory criteria which could be scrutinised which is quite unlike s.80(3).

38. At [54] the Appellant seeks to promote the reasoning of the Primary Judge who concluded that once the statutory preconditions for an officer to be medically retired have been met, 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]. This is, with respect, a bootstraps argument. It presumes that an officer mounting an unfair dismissal challenge to a forced medical retirement was in fact properly determined to meet the criteria for that dismissal. So too is the argument articulated at [56] to the effect that 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 position on the grounds of medical unfitness or incapacity. Here again the submission presumes

[30] See et IR Act s 88(a) & (b)

that an officer mounting an unfair dismissal challenge to a forced medical retirement was in fact properly determined to meet the criteria for that dismissal.

39. It is not difficult to imagine circumstances where the exercise of the power to dismiss pursuant to Section 72A could be attended by unfairness and open to misuse. One need go no further that the First Respondent's originating process in the instant case for an illustration[31]. There one can see from the letter dated 29 November 2016[32] from Lake Macquarie Local Area Commander (LAC) to First Respondent's solicitor that:

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i. There was a dispute as to whether or not he had served a medical opinion;

ii. There was a complaint that the First Respondent had not co-operated with the process of seeking an independent medical examination;

iii. There is an express suggestion that the LAC would rely on older opinions in the absence of a fresh medical examination;

iv. There is a clear inference that the LAC was allowing conduct-based considerations to enter his decision making and recommendations.

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40. The First Respondent's position as articulated in his grounds set out in his "Application for Relief in Relation to Unfair Dismissal" were briefly stated as including a suggestion to the effect that the matter was one where he was recommended for a transfer to another LAC to resolve the matter, but his employer refused. The First Respondent thus framed the dispute as more of an industrial problem than a medical problem.

41. Whilst this Court cannot form any meaningful view of the issues in the unfair dismissal application from what little information is to hand, a cursory examination

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of the originating process serves to illustrate that a decision to medically retire a

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[31] See Appellant's Book of Further Materials at [4] to [16]
[32] See Appellant's Book of Further Materials at [12] & [13]

non-executive police office pursuant to s 72A of the Police Act can involve wider industrial issues.

42. The submissions of the Appellant at [58] to [62] as to Section 85 and 218 of the Police Act are effectively already addressed by the submissions above.

Part VI: NOTICE OF CONTENTION OR CROSS-APPEAL

43. N/A.

Part VII: TIME REQUIRED

44. The First Respondent will require approximately 1 to 2 hours to present oral argument.

Dated: 29 June 2021

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Annexure to the First Respondent's Written Submissions – Legislative Provisions