IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S230 of 2012

BETWEEN:

COMMISSIONER OF POLICE
Appellant

DAVID GRANT EATON
First Respondent

INDUSTRIAL RELATIONS COMMISSION OF NSW
Second Respondent

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APPELLANT'S REPLY

Part I: Suitable for publication

20 1. The Commissioner certifies that the reply is in a form suitable for publication on the Internet.

Part II: Concise reply to the argument of the first respondent

2. These submissions reply to those of the First Respondent filed on 14 September 2012 and served on 17 September 2012 (**RS**).

3. **RS para 11.** The Commissioner's power to dismiss under s 80(3) of the *Police Act* 1990 (NSW) (**Police Act**) is different in nature from the common law power

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of an employer to summary dismiss an employee under contract. Unlike the common law power, which can be only exercised in cases of serious misconduct or a breakdown in the necessary trust and confidence in the employment relationship (*Blyth Chemicals v Bushnell* (1933) 49 CLR 66 at 81 – 82; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at [25] and [51]), the Commissioner's power applies to all situations at any time regardless of the reasons for dismissal.

4. **RS paras 15 - 17**. Neither s44(2A) nor s181D(7) of the Police Act expressly deals with whether probationary police officers can bring an unfair dismissal claim under Pt 6 of Ch 2 of the IR Act. Both provisions were inserted at different times, in different contexts, to achieve different objectives, thereby highlighting that the real problem is one of statutory interpretation because Parliament did not expressly state an intention either that the two statutory regimes should both apply in such a case or the one regime should apply to exclusion of the other. It is a problem to be resolved by reference to *Project Blue Sky* considerations to give effect to the language of the competing statutes in light of their contexts and purposes.

5. **RS paras 19 and 20:** The Court in *Ferdinands v Commissioner of Police* (2006) 225 CLR 130 also placed emphasis on the presence in the South Australian police legislation of an "*elaborate system of merits review*" of the kinds of decisions that are to be subject to review and the ways in which those decisions are to be reviewed and, importantly, the kinds of decisions which are not subject to review ([55] – [57] per Gummow and Hayne JJ). In similar terms to the South Australian legislation considered in *Ferdinands*, Pt 9 of the Police Act is to be read as comprising affirmative words which also have a negative force of forbidding other merits review outside that explicitly provided for in those provisions. These provisions give the appearance of exhaustiveness in governing the rights and remedies of police officers in relation to their discipline and removal from the NSW Police Force ([4] and [10] per Gleeson CJ).

6. **RS paras 21 and 22**: Resorting to the statutory history of the Commissioner's power to remove police officers in the Police Act does not help in resolving the construction of the present provisions. The Commissioner's power of dismissal inserted as s179(1) by the *Police Service (Complaints, Discipline and Appeals Act)* 1993 (NSW) was constrained by an intricate regime which required the preferment of a departmental charge against the police officer. As a direct response to recommendations of the Wood Royal Commission, the *Police Service Amendment Act* No 23 of 1997 (NSW) (**1997 Police Amendment Act**) inserted the comprehensive regime for the removal of police officers, one that did not cover probationary police officers (this was common ground before the Court of Appeal [103]). It merely replaced one specific merit review regime with another.

7. **RS paras 28:** The general provision of an exemption by regulation of "*employees serving a period of probation or qualifying period*" (underlining added) from the operation of the unfair dismissal provisions in s83(2)(b) of the IR Act does not accord with the notion of probationary appointment under s80(1) and the *Police Regulation* 2008 (NSW) made under s80(2) of the Police Act. Any regulation made under s83(2)(b) of the IR Act is solely determined by reference to time served during a probationary period. But the nature of the legislative regime established by the Police Act is not constrained in that fashion, as is revealed by the regulation contemplated by s80(2); cf *Deputy Federal Commissioner of Taxation for the State of South Australia v Ellis and Clark Ltd* (1934) 52 CLR 85 at 89 (per Dixon J) and *Master Education Service Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19]. Under the Police Regulation, the completion of a "period of probation" (cl 12) is a necessary but not a sufficient basis to be confirmed as a police officer; other criteria must also be satisfied to the Commissioner's satisfaction (cll 13 and 14).

8. **RS paras 29 – 31**: The parties disagree as to the extent of the differences in practice between Pt 9 of the Police Act and Pt 6 of Ch 2 of the IR Act. But the First Respondent's attempts to seek to minimise the apparent practical

differences fail to grapple with the critical question: why was it considered necessary to create a comprehensive scheme in Pt 9 of the Police Act, which picked up and expressly modified the provisions in Pt 6 of Ch 2 of the IR Act. Indeed, in the Second Reading Speech to the 1997 Police Amendment Act inserting the removal provisions in Pt 9 of the Police Act, Mr Whelan, the then Minister for Police, noted that there were "*some important differences*" between the proposed changes to Pt 9 and the unfair dismissal provisions in the IR Act (RS p 34) which underpinned the creation of a specific removal regime in Pt 9.

9. **RS para 33(a)**: *Kerr v Commissioner of Police and Crown Employees Appeal* Board [1977] 2 NSWLR 721 highlights that the merit review rights for probationary police officers have formerly existed in special police appeal legislation and not general industrial relations legislation. It confirms that police probationers always been subject to a regime that has been attenuated to deal with the special concerns of policing.

10. **RS para 33(b)**: The distinction between the process of non-confirmation of a probationary police officer under the Police Regulation and the dismissal of probationary police officer under s80(3) is one without substance. In both cases, the Commissioner decides to end the probationary police officer's provisional appointment without his or her consent: see *Smith v Director-General of School Education* (1993) 31 NSWLR 349 at 366.

11. The Commissioner's position is consistent with the very purpose of, and value in, appointing a probationary police officer: the person is on "trial" and does not enjoy all of the benefits which permanent appointment such as the right to a merit review of the decision to dismiss: *Ex parte Wurth; Re Tully* [1955] 55 SR (NSW) 47 at 49; *Director-General of the Department of Corrective Services v Mitchelson* (1993) 26 NSWLR 533 at 658 (per Kirby P).

12. **RS para 40**: In determining the proper operation of s218, it does not matter whether s80(3) of the Police Act has existed since the commencement of the Police Act. The legal meaning of s218, as opposed to its literal meaning, remains the same regardless of when s80(3) was inserted.

13. **RS para 41**: The absence of a proviso similar to that considered in *Rose v Hvric* (1963) 108 CLR 353 emphasises that the search for an express provision modifying or defeating the Police Act is misdirected. To the contrary, the absence of an express provision modifying the IR Act directs attention to the consideration of the language, purpose and structure of the Police Act from which a legislative intention is to be discerned.

Dated: 21 September 2012

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