

BETWEEN:

COMMISSIONER OF POLICE

Appellant

DAVID GRANT EATON

First Respondent

INDUSTRIAL RELATIONS

COMMISSION OF NSW

Second Respondent

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APPELLANT'S SUBMISSIONS

20 **Part 1: Suitable for publication**

1. The appellant (**Commissioner**) certifies that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of issue

2. Whether the exercise of power by the Commissioner to dismiss a probationary police officer under s80(3) of the *Police Act 1990* (NSW) (**Police Act**) is a dismissal which, if the dismissed officer claims it was harsh, unreasonable or unjust, is within the jurisdiction of the Industrial Relations Commission of NSW

(IRC) under Part 6 of Chapter 2 of the *Industrial Relations Act 1996* (NSW) (IR Act).

Part III: Notices pursuant to s78B of the Judiciary Act.

3. The Commissioner certifies that he has considered whether s78B notices should be given, and concluded that they should not be given.

Part IV: Decisions below.

4. The decision of the Commissioner at first instance is *David Eaton and Commissioner of Police* [2010] NSWIRComm 1035. The decision of the Full Bench on appeal is *Commissioner of Police v Eaton* [2011] NSWIRComm 51, reported at (2011) 207 IR 209. The decision of the Court of Appeal exercising supervisory jurisdiction is *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30, and is not otherwise reported.

Part V: Narrative statement of the relevant facts.

5. The first respondent (**Mr Eaton**) attested as a probationary police officer on 7 May 2007. On 22 July 2009, the Commissioner's delegate, Assistant Commissioner Michael Corboy, dismissed Mr Eaton under s80(3) of the Police Act, at which time he was still a probationary police officer (his appointment not having been confirmed as required by cll 13 and 14 of the *Police Regulation 2008* (NSW)). That exercise of power was preceded by a lengthy period during which matters concerning the performance by Mr Eaton of his duties were debated, including by a "Notice foreshadowing your dismissal from the NSW Police Force pursuant to the Police Act (NSW) 1990 s80(3)" dated 4 February 2009: see [2010] NSWIRComm 1035 at [54]-[98].
6. By application made on 30 July 2009, Mr Eaton applied to the IRC under s84 of the IR Act. His claim was upheld on 30 June 2010, and reinstatement was ordered, but stayed pending appeal.

7. The Commissioner appealed, which appeal was confined to the question of jurisdiction. By decision made on 5 May 2011, a Full Bench found that the IRC lacked jurisdiction, allowed the appeal, and dismissed Mr Eaton's application for want of jurisdiction.

10 8. Mr Eaton sought judicial review pursuant to s69 of the *Supreme Court Act 1970* (NSW). On 6 March 2012 the Court of Appeal quashed the decision and orders of the Full Court and remitted the matter to be determined in accordance with law. Pursuant to those orders, on 20 March 2012, a Full Bench granted leave to appeal from the Commissioner's decision, but dismissed the appeal. The Commissioner did not seek a stay pending any grant of special leave, but reinstated Mr Eaton to his previous position as a probationary police officer, on terms that Mr Eaton would not take issue with this point in the application for special leave.

9. On 17 August 2012, this Court granted special leave to appeal from the decision of the Court of Appeal, subject to a special costs order that the Commissioner pay Mr Eaton's costs in this Court, and that the costs orders in the courts below not be disturbed, the appeal being in the nature of a test case.

20 **Part VI: Appellant's argument**

10. The question whether the subject-matter jurisdiction of the IRC extends to exercises of the s80(3) power is a pure question of law, dependent upon the construction of and interrelationship between the Police Act and the IR Act. On their proper construction, the IRC does not have jurisdiction to hear and determine a claim for unfair dismissal by a probationary constable, because:

- (a) the terms of the power conferred by s80 are inconsistent with such a right;
- (b) the alternative is that probationary constables who are dismissed enjoy superior rights of review than confirmed constables, a result which the court would strain to avoid;

30 (c) the provision relied on by the Court of Appeal (s218 of the Police Act) does not displace the foregoing.

With respect, error is disclosed with respect to each of the foregoing in the reasons of the Court of Appeal. Each is addressed in turn below.

11. **A. The terms of s80.** The starting point is the concise statutory language by which the power is conferred. It is in these terms (emphasis added):

The Commissioner may dismiss any such probationary police officer from the NSW Police Force at any time and without giving any reason.

The following textual and contextual matters may be noted immediately.

- 10 12. **(a) “at any time” and “without giving any reason”** “At any time” and “without giving any reason” are terms apt to be given their full meaning and effect. As the Full Bench observed, whether a dismissal is harsh, unreasonable or unjust may, as a matter of logic, require an examination of the reason why the employee was dismissed and the timing of any dismissal by reference to s 88 of the IR Act: at [32]-[33]. The express legislative confirmation that the power is unfettered in respect of reasons and timing in s80(3) is an immediate indication that the exercise of that power is not to be reviewed by reference to the harshness, unreasonableness or unjustness of the reasons and timing of its exercise.

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13. **(b) comparable and contrasting provisions.** The language of s80(3) resembles that of s51 of the same Act which authorises removal of executive officers “at any time for any or no reason and without notice” considered in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44. Of that provision, Gleeson CJ and Callinan J separately said the grant of power is significant not only in what is said, but also in what is not said: at [22] and [129]. In this appeal, as in *Jarratt*, there is utility in contrasting the terms of s80(3) with other powers of dismissal applicable to confirmed officers, notably, s181D:

- 30 (a) The s181D power may not be exercised “at any time”; instead it must be preceded by the provision of a notice setting out the grounds, a period of at

least 21 days for written submissions by the officer which are to be taken into consideration by the Commissioner: s181D(3).

(b) Further, the s181D power must be accompanied by reasons, which reasons are then the first *Peko-Wallsend* mandatory relevant consideration to be considered by the IRC in the event that the officer exercises his or her right of review under s181E: see s181F(1)(a).

10 14. Sections 181D-181J post-date s80, but a similar contrast may be made within Part 9 Division 1, enacted at the same time as s80 and s218, where once again the power to take action must be preceded by a notice and an opportunity to make submissions, and if exercised must be accompanied by reasons: s173(5) and (7).

20 15. The contrast between the competing legislation is acute where a police officer is dismissed because of an offence for neglecting or refusing to obey any lawful order or carry out any lawful duty as a police (s 201). The expression "dismissal" in s 83(5) of the IR Act includes, relevantly, in relation to a public sector employee, a dismissal as a consequence of the commission of an offence. If the unfair dismissal provisions did apply to probationary police officers, it would produce an outcome that would be at odds with the disciplined character of the police force.

16. **(c) legislative antecedent.** The immediate antecedent to s80(3) was r11(b) of the *Police Rules 1977* made under the *Police Regulation Act 1899* (NSW), which provided that:

"he may be discharged or dismissed by the Commissioner during the period of his probation without any reason being assigned".

30 The words "at any time" in s80(3), which are absent from r11(b), appeared in one of the powers considered in *O'Rourke v Miller* (1985) 156 CLR 342 (see s9(1) of the *Police Regulation Act 1958* (Vic) reproduced at 356) which Gibbs CJ described at 349 as "an unfettered power to dismiss a police cadet".

17. Thus the introduction of the words “at any time” relatively shortly after this Court’s decision in *O’Rourke* strengthens the conclusion that the s80(3) power is unfettered by timing.

18. **(d) “Probationary”**. The foregoing is further reinforced by the fact that the power applies only to probationary officers. The premise of the Act is that there is to be a NSW Police Force comprising the Commissioner, members of the NSW Police Force Senior Executive Service, all other police officers and administrative officers employed under the Act, and temporary employees: s5. Temporary employees are not police officers: s11(5). All police officers must take an oath or make an affirmation before exercising any functions of a police officer: s13(1).

19. Appointments within the class of “Non-executive police officers” within the NSW Police Force is addressed in Part 6 of the Act. Within that class, the Act distinguishes between constables appointed on probation, and officers whose appointment has been confirmed. Section 80(1) and (2) is a power of appointment separate from that in s64, and attended by different requirements. In particular, s80(2) uses mandatory language (“is to be appointed on probation”) and the regulations have at all times made it clear that an appointment on probation is distinct from and a prerequisite to the confirmation of appointment: see cl 13(b).

20. This reflects a long-standing practice of probationary appointment. As Gibbs J said in *O’Rourke* at 350, “probation is a time of testing or trial and a probationer whose conduct, character or qualifications fail to meet the test need not be confirmed in the office to which he was provisionally appointed”. That in turn reflects the “history and character” of the police force to which Gleeson CJ referred in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [5], including, most relevantly to the present appeal, the point noted by Gummow and Hayne JJ at [51], that “different considerations inform the exercise

of power under the *Police Act* [of South Australia] from those that inform the exercise of power under the wrongful dismissal provisions”.

21. **Errors in the reasoning of the Court of Appeal.** The Full Bench of the IRC addressed the difficulty in reconciling the terms of s80(3) with the IR Act in some detail at [31]-[36]; the appellant adopts that reasoning.

10 22. In contrast, those terms were put to one side by Handley AJA at [43]-[45] without analysis of how the power conferred was at odds with the application of the IR Act. Tobias AJA summarised the Full Bench's reasons at [99]-[102], but when addressing the argument, focussed not so much on the inconsistency of the powers, but a rejection that the s80(3) power was “personal” in the sense of not being reviewable: see at [141]-[149]. The Commissioner does not contend (nor was it contended below) that the s80 power is unreviewable (nor could he, in light of *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 and *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* [2012] HCA 25). However, the question left unaddressed by the reasons of Tobias AJA is not whether the exercise of the power may be reviewed, but whether the terms of the power are incompatible with its being reviewed by the IRC (as opposed to by the Supreme Court in its supervisory jurisdiction).

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23. **B. Superior rights of confirmed officers.** Error is also disclosed in the reasons of Tobias AJA in rejecting the proposition that a probationary constable would have an advantage over a confirmed constable on the construction adopted by him (the point does not appear to have been addressed by Handley AJA at all). With respect, his Honour's reasons at [150]-[152] fail fully to grapple with the point:

30 (a) First, in addressing s181F(2), it is plain that as a matter of legal meaning, that subsection places the confirmed police officer at a forensic disadvantage compared to other applicants in the IRC, and it is clear that where the reason for dismissal is misconduct, that disadvantage may be

considerable and indeed determinative. No sound reason is advanced to support the conclusion that “little or no weight” can be placed upon s181F(2) (at [152])

(b) Secondly, the provisions which are prejudicial to confirmed officers are not confined to s181F(2). They include s 181F(1), s181F(3)(b), s181G (and especially s181G(1)(f) and s181H(1) and (2). Section 181F(3)(b) is nowhere addressed by Tobias AJA. Section 181G(1)(f) is referred to at [76]-[79], with a view to concluding that its practical impact is relatively low. With respect, what matters is not merely the practical impact, but the express legislative intention to treat differently and disadvantageously. Section 181H is not addressed at all.

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24. The unanswerable fact is that the Police Act discloses a legislative intention in particular respects to subtract from what would otherwise be the rights enjoyed by confirmed officers who have been removed and who claim in the IRC that that removal was harsh, unjust or unreasonable. Those disadvantages may or may not in practical terms be relatively minor (although it may be thought that the Full Bench would be well placed to assess their practical impact, as it did at [55]). But what matters is not so much the extent of the disadvantages, but the elaborate way in which special provisions have been enacted to implement a legislative policy. That goes directly to the *Project Blue Sky* considerations of the legislative unity and the process of reading down the otherwise generality of a provision like s218.

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25. It may be acknowledged that care must be taken in preferring a particular construction lest there be an “anomaly”; for the process of reconciliation *regularly* leads to a lack of “fit” within the same statute: cf *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [84]-[85]. However, in the present case the anomaly is striking. A probationary constable is a position with a long ancestry (considerably antedating unfair dismissal legislation): see *Kerr v Commissioner of Police and Crown Employees Appeal Board* [1977] 2 NSWLR 721. A probationary constable has not been confirmed and is (as the adjective

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suggests) required to prove that he or she is worthy of confirmation. *Many* provisions in the Police Act in terms closely regulate the unfair dismissal rights of confirmed officers; this is a clear case where the evident legislative intention should not be subverted by granting probationary constables more advantageous rights of review.

10 26. **C. Section 218.** Plainly enough, s218 cannot mean what it says. The Police Act is replete with examples of what Francis Bennion labelled “indirect express amendment” (cf *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [9]): see, inter alia, ss44, 88, 179, 180, 181D and 181E-181K. Section 218 cannot on its proper construction nullify the legal effect of all of those provisions (the first four of which were enacted at the same time as s218). It is not understood that Mr Eaton submits to the contrary.

27. Section 218 therefore needs to be given a legal meaning which is distinct from its literal meaning; as Dixon J said in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 626,

20 when two apparently inconsistent provisions occur in one Act of Parliament, to reconcile them by interpretation is the only course open. They cannot both receive their full meaning as it is expressed.

Moreover, s218 is a clear case of a “competing provision”, whose legal meaning falls to be determined by an “adjustment” such as will “best give effect to the purposes and language of those provisions while maintaining the unity of all the statutory provisions”: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]. A similar point was made (in relation to determining the legal meaning of privative clauses) by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 617 (“there then arises a contradiction, and effect must be given to the whole legislative instrument by a process of reconciliation”) and the “conundrum of contrariety requiring a resolution of competing elements of the one legislative instrument” to which reference was made in *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at [94].

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28. The solution is to identify a “clear intention” from the text and structure of the apparently internally inconsistent legislation so as to determine which is the “leading provision and which the subordinate provisions, and which must give way to the other” (cf *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 cited in *Project Blue Sky* at [70]).” As Dixon J put it in *South-Eastern Drainage Board* at 627, one seeks to find a “clear intention”, which is done by a careful analysis of all of the provisions (cf *South-Eastern Drainage Board* at 629-630).
- 10 29. The purpose of the distinct and contrasting regimes governing the power to remove probationary and confirmed officers is to give a wider, less-fettered power to dismiss men and women who have never been confirmed as full members of the Police Force. The differences apparent from the text and structure of the Act dealing with these two classes of officers are subverted on the approach adopted by the Court of Appeal (which gives *greater* rights of review by the IRC to probationary officers who are dismissed). That does not advance the unity of all of the statutory provisions.
- 20 30. **Errors in the reasoning of the Court of Appeal.** Both Handley AJA and Tobias AJA regarded s218 as highly significant if not determinative. For Handley AJA, the reasoning at [25]-[28] and [46] treated the presence of s218 as determinative (Handley AJA also relied on s405 of the IR Act (at [32]-[34] and [46]), but, with respect, that does not bestow unfair dismissal rights and has no application relevant to the present appeal).
31. Handley AJA appears to have treated s218 as bearing its literal meaning, thereby being sufficient to resolve the question whether the regime in the IR Act applied; that with respect does not grapple with the need first to give to s218 a legal meaning which necessarily is different from its literal meaning.
- 30 32. The approach of Tobias AJA was more elaborate, but, with respect, also discloses error. His Honour applied a very fine distinction between “explicit or

implicit contradiction" on the one hand, as opposed to "inferential contradiction" on the other: at [180]-[182]. That distinction was drawn by Kirby P in *Public Service Association v Industrial Commission of New South Wales* [1985] 1 NSWLR 627 when construing a provision (s8 of the *Public Service Act 1979*) in quite different terms from s218: "Unless otherwise expressly provided, nothing in this Act affects the *Industrial Arbitration Act 1940*".

10 33. It is trite law that "express" provision to the contrary, whilst it may be sufficient, can never be necessary; see for example *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603. Ultimately this is a matter of parliamentary supremacy and the limited scope of "laws respecting the constitution, powers and procedures" of the State legislatures: see *Rose v Hvrlic* (1963) 108 CLR 353 at 357 and *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 617-618, 625-7 and 634 and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [71]-[80]. An example of the correct approach may be seen in *Black v Director-General of Education* [1982] 2 NSWLR 714, where the words "notwithstanding anything contained in any other Act" did not bear their literal meaning. Accordingly, this Court in *Rose v Hvrlic* gave content to the statutory words "Except where otherwise expressly enacted" by *not* excluding enactments by implication, but as excluding
20 "inferential contradiction".

34. For completeness, it may be noted that there is a statement in *Gourlay v Casey* (1927) 38 CLR 586 at 591 to the effect that implication can have no role; if necessary to do so, that should be overruled.

35. The distinction identified in *Rose v Hvrlic* and applied by Tobias AJA is, with respect, a very difficult distinction to maintain, although it was noted without criticism in *Ferdinands* at [48]. It is said that:

30 The contrast is between, on the one hand, a conclusion from what has been enacted that a further provision is a logical next step, the legislature not having taken that next step for itself, and, on the other hand, a

conclusion that a provision which has been made means more than it explicitly says.

36. But that distinction arises in a very different context, namely, the facts on which a court can rely on the hearing of a demurrer: see *Lubrano v Gollin & Co Pty Ltd* (1919) 27 CLR 113 at 118 and *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 125. That is a very different task from the question of giving legal meaning to an apparently internally inconsistent statute.

10 37. It is not necessary in order to resolve this appeal to determine that point. As is plain from *Rose v Hvrlic*, the distinction was drawn in order to accommodate the express qualification of “unless otherwise expressly provided”. The present issue is different. Section 218 admits of no qualification *at all* upon its literal meaning. It cannot bear that literal meaning. There is no need to resort to a distinction between implicit and inferential contradiction. Section 218 does not prevent basic textual and structural features of the Police Act from having their effect, even though they be contrary to the rights which would otherwise be conferred by the IR Act. When one looks at “the scheme as a whole” (cf *Commissioner of Police for New South Wales v Sewell* [2009] NSWCA 198; 20 (2009) 185 IR 458 at [38] (Spigelman CJ)) or a “clear intention” as required by Dixon J, the text and structure and context of the Police Act lead to the conclusion that the IRC lacks jurisdiction.

38. That, in essence, was the reasoning of the Full Bench of the Industrial Relations Commission at [57]-[63] which the appellant adopts.

30 39. Finally, the foregoing is supported by a contextual consideration. Section 218 as originally enacted referred to the *Industrial Arbitration Act 1940* (NSW), and was directed against the proposition that the Police Act 1990 impliedly repealed the latter. It was amended to update it to refer to the applicable industrial relations legislation at the particular time. It was premised upon the Police Act

post-dating the industrial relations legislation. Its role, now that the Police Act *predates* the IR Act, is wholly or largely spent.

Part VII: Applicable statutes and regulations.

40. A copy of the relevant provisions of the Police Act and IR Act is annexed to these submissions. These provisions are still in force in that form at the date of making the submissions

Part VIII: Orders

- 10 41. The appeal be allowed.
42. Set aside orders (a), (b) and (c) made on 6 March 2012 by the Court of Appeal and in lieu thereof order that (1) the appeal be dismissed and (2) set aside the orders made on 24 March 2012 by the Full Bench pursuant to the orders of the Court of Appeal.
43. In accordance with the terms on which special leave was granted, order that the Commissioner pay the costs of the first respondent in this Court, and note that order (d) made on 6 March 2012 by the Court of Appeal is not disturbed.

Part IX: Estimated time for argument

- 20 44. The Appellant estimates that the time required for presentation of the oral argument (including reply) is 2 hours.



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Police Act 1990 No 47

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4 Establishment of NSW Police Force

The NSW Police Force is established by this Act.

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5 Composition of NSW Police Force

The NSW Police Force comprises the following members:

- (a) the Commissioner,
- (b) members of the NSW Police Force Senior Executive Service,
- (c) all other police officers and administrative officers employed under this Act,
- (d) temporary employees.

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6 Mission and functions of NSW Police Force

- (1) The mission of the NSW Police Force is to work with the community to reduce violence, crime and fear.
- (2) The NSW Police Force has the following functions:
 - (a) to provide police services for New South Wales,
 - (b) to exercise any other function conferred on it by or under this or any other Act,
 - (c) to do anything necessary for, or incidental to, the exercise of its functions.
- (3) In this section:

police services includes:

 - (a) services by way of prevention and detection of crime, and
 - (b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and
 - (c) the provision of essential services in emergencies, and
 - (d) any other service prescribed by the regulations.
- (4) A reference in this section to the functions of the NSW Police Force includes a reference to the functions of members of the NSW Police Force.
- (5) The provision of police services in emergencies and rescue operations is subject to the State Emergency and Rescue Management Act 1989 and to the Essential Services Act 1988.
- (6) Nothing in this section confers on the NSW Police Force a power to provide a police service in a way that is inconsistent with any provisions applicable to police officers under the Law Enforcement (Powers and Responsibilities) Act 2002.



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7 Statement of values of members of NSW Police Force

Each member of the NSW Police Force is to act in a manner which:

- (a) places integrity above all,
- (b) upholds the rule of law,
- (c) preserves the rights and freedoms of individuals,
- (d) seeks to improve the quality of life by community involvement in policing,
- (e) strives for citizen and police personal satisfaction,
- (f) capitalises on the wealth of human resources,
- (g) makes efficient and economical use of public resources, and
- (h) ensures that authority is exercised responsibly.

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8 Commissioner to manage and control NSW Police Force

- (1) The Commissioner is, subject to the direction of the Minister, responsible for the management and control of the NSW Police Force.
- (2) The responsibility of the Commissioner includes the effective, efficient and economical management of the functions and activities of the NSW Police Force.
- (3) The Commissioner may classify the various duties that members of the NSW Police Force are required to perform and allocate the duties to be carried out by each such member.
- (4) The Commissioner may issue (and from time to time amend or revoke) instructions to members of the NSW Police Force with respect to the management and control of the NSW Police Force.
- (4A) The Commissioner (on behalf of the Crown) may make or enter into contracts or arrangements with any person for the carrying out of works or the performance of services or the supply of goods or materials in connection with the exercise of the functions of the NSW Police Force.
- (5) This section is subject to the other provisions of this Act and the regulations.

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9 (Repealed)

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10 Positions in NSW Police Force

- (1) In addition to the position of Commissioner, the positions in the NSW Police Force consist of such positions as the Commissioner may determine in accordance with this Act.
- (2) The Commissioner:
 - (a) may create, abolish or otherwise deal with any position in the NSW Police Force, and
 - (b) must classify and grade each such position.
- (3) (Repealed)
- (4) Police officers of the rank of constable (or such of those police officers as the Commissioner determines) are to be appointed to that rank or to a grade within that rank, and hold a position (but not a separate position) in the NSW Police Force.
- (5) Temporary employees are members of, but do not hold positions in, the NSW Police Force.
- (6) The Commissioner may establish, or abolish, or change the name of, any branch or other part of the NSW Police Force (other than the NSW Police Force Senior Executive Service).

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11 Designation of police officers

- (1) The Commissioner is required to designate the positions in the NSW Police Force which are to be held by police officers.
- (2) A position in the NSW Police Force is to be so designated if the Commissioner is satisfied that the holder will be required to carry out, or will be concerned in, operational police duties or that it is otherwise appropriate to do so.
- (3) The Commissioner may not designate such a position while it is being held by an administrative officer or remove the designation of such a position while it is being held by a police officer.
- (4) The Commissioner is a police officer.
- (5) A temporary employee is not eligible to be a police officer.

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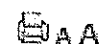
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12 Ranks and grades of police officers

- (1) The ranks of police officers within the NSW Police Force are (in descending order) as follows:
 - (a) Commissioner.
 - (b) Member of the NSW Police Force Senior Executive Service.
 - (c) Superintendent (other than a member of the NSW Police Force Senior Executive Service).
 - (d) Inspector.
 - (e) Sergeant.
 - (f) Constable.
- (2) The Commissioner, with the approval of the Minister, may specify different ranks for police officers within the NSW Police Force Senior Executive Service.
- (3) The regulations may specify grades within the ranks of superintendent, inspector, sergeant and constable.

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13 Oath to be taken by persons exercising police functions

- (1) Before a person exercises any of the functions of a police officer, the person must take the oath or make the affirmation of office as a police officer in accordance with the regulations.
- (2) A police officer is not required to take a further oath or make a further affirmation after a change in the officer's position in the NSW Police Force, so long as the officer remains in the NSW Police Force.

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14 Additional functions of police officers

- (1) In addition to any other functions, a police officer has the functions conferred or imposed on a constable by or under any law (including the common law) of the State.
- (2) Nothing in this section confers on a police officer a power to exercise a function in a way that is inconsistent with any provisions applicable to police officers under the *Law Enforcement (Powers and Responsibilities) Act 2002*.

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44 Industrial arbitration and legal proceedings excluded

- (1) In this section, a reference to the employment of an executive officer is a reference to:
 - (a) the appointment of, or failure to appoint, a person to a vacant executive position, or
 - (b) the removal, retirement, termination of employment or other cessation of office of an executive officer, or
 - (c) any disciplinary proceedings or disciplinary action taken against an executive officer, or
 - (d) the remuneration or conditions of employment of an executive officer.
- (2) The employment of an executive officer, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the *Industrial Relations Act 1996*.
- (2A) Part 6 (Unfair dismissals) and Part 9 (Unfair contracts) of Chapter 2 of the *Industrial Relations Act 1996* do not apply to or in respect of the employment of an executive officer.
- (3) Subsection (2) applies whether or not any person has been appointed to a vacant executive position.
- (4) Any award or industrial agreement (whether made before or after the commencement of this section) does not have effect in so far as it relates to the employment of executive officers.
- (5) Subsection (4) does not prevent the regulations or other statutory instruments under this Act from applying the provisions of an award or industrial agreement to the employment of an executive officer.
- (6) An appeal does not lie to GREAT in relation to the employment of an executive officer.
- (7) No proceedings for an order in the nature of prohibition, certiorari or mandamus, or for a declaration or injunction or for any other relief, lie in respect of the appointment of or failure to appoint a person to a vacant executive position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment.
- (8) In this section, *industrial agreement* includes any determination under section 85 and any agreement under section 86.



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51 Removal of executive officers from office

- (1) An executive officer may be removed from office at any time for any or no reason and without notice:
 - (a) by the Governor on the recommendation of the Commissioner, in the case of a Deputy Commissioner or Assistant Commissioner, or
 - (b) by the Commissioner, in any other case.
- (1A) A recommendation referred to in subsection (1) (a) may not be submitted to the Governor except with the approval of the Minister.
- (2) The Commissioner:
 - (a) may declare an executive officer who is removed from an executive position under subsection (1) to be an unattached officer in the NSW Police Force, and
 - (b) may revoke any such declaration.
- (3) While a declaration under subsection (2) remains in force, the person to whom the declaration relates:
 - (a) is to be regarded as an executive officer, although not holding an executive position, and
 - (b) is entitled to monetary remuneration and employment benefits as if the person had not been removed from his or her position, and
 - (c) is, for the purposes of section 87 of the *Public Sector Employment and Management Act 2002*, to be regarded as holding an equivalent (though notional) executive position in the NSW Police Force.
- (4) If:
 - (a) an executive officer is removed from an executive position under subsection (1) and a declaration is not made in relation to the officer under subsection (2), or
 - (b) a declaration under subsection (2) made in relation to an executive officer is revoked,

the officer ceases to be an executive officer, unless appointed to another executive position.

- (5) A member of the NSW Police Force who ceases to be an executive officer because of subsection (4) ceases to be a member of the NSW Police Force, unless appointed to another position in the NSW Police Force.
- (6) The making of a declaration under subsection (2) in relation to an executive officer does not prevent the officer from ceasing to be an executive officer because of the completion of the officer's term of office.
- (7) This section does not prevent an executive officer being removed from office apart from this section.

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Part 6

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Part 6 Non-executive police officers

Division 1 Preliminary

62 Officers to whom Part applies

This Part applies to all police officers (other than the Commissioner and members of the NSW Police Force Senior Executive Service).

63 Definitions

In this Part:

appointment means appointment by way of promotion or transfer or otherwise.

non-executive commissioned police officer means a commissioned police officer to whom this Part applies.

non-executive police officer means a police officer to whom this Part applies.

vacant position means:

- (a) a position that is not held by a person, or
- (b) a position to which a person is temporarily appointed, or
- (c) a position that is temporarily held by a person who is temporarily appointed to another position in accordance with section 67 (2).

Division 2 Appointment of non-executive police officers

64 Appointments to non-executive police officer positions

- (1) An appointment (whether by way of transfer or promotion or otherwise) as a non-executive police officer is to be made by the Commissioner.
- (2) It does not matter whether the person appointed is or is not already a member of the NSW Police Force.
- (3) In particular, it does not matter whether the person appointed is or is not a police officer at the time of appointment.

- (4) As soon as practicable after a person is appointed (whether by way of transfer or promotion or otherwise) as a non-executive police officer, the Commissioner is required to notify the Police Integrity Commission of the identity of the person so appointed.

65 Filling non-executive positions by either police or administrative officers

- (1) If the Commissioner is satisfied that a position (other than a position designated for members of the NSW Police Force Senior Executive Service) is suitable for either a police officer or an administrative officer, the position may, for the purpose of the selection process, be designated as a position available to both police and administrative officers.
- (2) Before a person is appointed to any such vacant position, the Commissioner must determine whether it is to be the position of a police officer or an administrative officer (and the provisions of this Part or Part 6A relating to the filling of such a vacancy apply accordingly).

66 Appointments to be made on merit

- (1) This section applies to appointments to vacant positions of non-executive police officers (other than constables).
- (2) In deciding to appoint a person (other than by way of promotion) to a vacant position of a non-executive police officer, the Commissioner must, from among the applicants who are eligible for appointment, select the applicant who has, in the opinion of the Commissioner, the greatest merit.
- (3) The Commissioner is, for the purpose of determining the merit of persons for appointment (other than by way of promotion) to a vacant position of a non-executive police officer, to have regard to:
 - (a) the nature of the duties of the position, and
 - (b) the abilities, qualifications, experience, standard of work performance and personal qualities of those persons that are relevant to the performance of those duties.
- (4) In deciding to appoint a person by way of promotion to a vacant position of a non-executive police officer, the Commissioner must appoint a person from the promotion list for the rank or grade within the rank concerned who is a person available for appointment and who has the greatest merit according to rankings on the list.
- (5) Despite subsection (4), the Commissioner may, in the case of a position identified by the Commissioner as requiring specialist qualifications, appoint a person by way of promotion to any such position from the promotion list for the rank or grade concerned who has the greatest merit according to rankings on that list of persons who, in the opinion of the Commissioner, have the qualifications required for that position.

66A Acting appointments to non-executive police officer positions

- (1) The Commissioner may appoint an officer to act in a non-executive police officer position that is vacant or the holder of which is suspended, sick or absent.
- (2) A person, while acting in a position under this section, has all the functions of the holder of the position.
- (3) The Commissioner may, at any time, terminate the appointment of a person to act in a position under this section.

- (4) This section does not prevent the payment of an allowance to an officer for exercising all or any of the functions of a non-executive police officer position if a person is not appointed to act in the position under this section.

67 Temporary appointments

- (1) (Repealed)
- (2) Without limiting section 90, the Commissioner may appoint temporarily to a vacant position of a non-executive police officer a police officer who is on the relevant promotion list for the rank or grade concerned, or is in the process of gaining the requisite qualifications for placement on that list, subject to the following:
 - (a) before the appointment can be made, the Commissioner and officer must agree, in writing, as to the command in which the officer will serve if the officer is not permanently appointed to the vacant position, and
 - (b) if the officer has permanently relocated his or her principal residence because of the temporary appointment, the officer is entitled to the costs and expenses of any further relocation agreed to under paragraph (a), those costs and expenses to be calculated in accordance with any relevant industrial award or enterprise agreement for transferred officers under the *Industrial Relations Act 1996*, and
 - (c) if the officer has relocated his or her principal place of residence because of the temporary appointment and has entered into an agreement, in writing, with the Commissioner to stay within the command to which the officer has been transferred if the officer is not permanently appointed to the vacant position, the officer cannot be involuntarily transferred under section 69 (except in accordance with action taken under section 173 (2) (d)) within a period of 3 years after the relocation.
- (3) An officer who ceases to be temporarily appointed to a position and who is not permanently appointed to the position has no right of return to the position from which the officer was temporarily appointed, unless:
 - (a) the officer has entered into an agreement under subsection (2) (a) to return to the command from which the officer was temporarily appointed, and
 - (b) no other officer has been appointed to the position from which the officer was temporarily appointed.
- (4) An administrative officer may not be appointed under this section to the position of a police officer.
- (5) The Commissioner may, at any time, terminate a temporary appointment under this section.
- (6) Section 66 does not apply to a temporary appointment under this section.

68 Statutory declaration as to misconduct

- (1) The Commissioner must, before appointing an officer temporarily under section 67 or otherwise under this Part, require the officer to provide a statutory declaration, in such form (if any) as may be prescribed by the regulations, that the officer has not knowingly engaged in specified misconduct or any other misconduct.
- (2) An officer who fails or refuses, or who is unable, to provide a statutory declaration in accordance with any such requirement is ineligible for appointment under the relevant provision.

- (3) The failure, refusal or inability of an officer to provide a statutory declaration in accordance with any such requirement must not be taken into consideration for a purpose other than the assessment of the officer's eligibility to be appointed to the position concerned.

69 Transfer of non-executive police officers

- (1) If the Commissioner considers it to be in the interests of the NSW Police Force to do so, the Commissioner may transfer a non-executive police officer from one non-executive police officer position to another non-executive police officer position or non-executive administrative officer position.
- (2) Such a transfer may be made if:
 - (a) the position to which the officer is transferred entitles its holder to the same level of remuneration as the officer's former remuneration, or
 - (b) the position to which the officer is transferred entitles its holder to a lower level of remuneration than the officer's former remuneration and:
 - (i) the officer consents to the transfer at the lower level of remuneration, or
 - (ii) the officer requested the transfer or the transfer is made pursuant to an order under section 173, or
 - (c) the officer concerned is being transferred from the rank of superintendent to which the officer is permanently appointed to another position within that rank—regardless of whether the position to which the officer is transferred entitles its holder to a remuneration that is the same as or different from the officer's former remuneration.
- (3) An officer transferred under subsection (2) (c) is entitled, for the balance of the term for which the officer holds office pursuant to section 74, to the same level of remuneration in respect of the new position as the officer's former remuneration if the position to which the officer is transferred ordinarily entitles its holder to a level of remuneration that is lower than the officer's former remuneration (unless the officer requested the transfer or it was made pursuant to an order under section 173).
- (4) A transfer under this section may be made only if the officer possesses the qualifications determined by the Commissioner for the other position.
- (5) The transfer under this section of a police officer to a non-executive administrative officer position may not be made without the approval of the police officer.
- (6) Section 66 does not apply to a transfer under this section.

70 Promotion lists

- (1) The Commissioner is to establish promotion lists of police officers eligible for promotion to the rank or grade within a rank of sergeant, senior sergeant, inspector and superintendent.
- (2) The regulations may make provision for or with respect to the following matters:
 - (a) the requirements for placement on a promotion list,
 - (b) without limiting paragraph (a), criteria for eligibility to undertake requirements (including meeting quota requirements),
 - (c) the ranking of police officers on a promotion list,

- (d) the period for which a police officer may remain on a promotion list or replacement promotion lists for the same rank or grade within a rank,
- (e) the appointment of persons from a promotion list to a rank or grade within a rank to which the list applies,
- (f) reviews of assessment of requirements for placement on a promotion list and of ranking on a promotion list,
- (g) reviews or appeals against a decision to suspend or remove a person from a promotion list, or to refuse a person the right to participate or continue to participate in any part of the process to obtain placement on a list, on integrity grounds,
- (h) without limiting paragraph (f) or (g), the procedures for and conduct of reviews,
- (i) circumstances in which a person may be removed or suspended from or restored to a promotion list,
- (j) the period for which, or the circumstances in which, a promotion list remains current,
- (k) notification of a decision to suspend or remove a person from a promotion list, or to refuse a person the right to participate or continue to participate in any part of the process to obtain placement on a list, on integrity grounds.

71 Integrity matters

- (1) It is the duty of the Commissioner:
 - (a) before selecting a person to complete an eligibility program for a rank or grade within a rank of police officer, to make inquiries (from the Commander, Professional Standards Command, and from any other person or body the Commissioner thinks appropriate), as to the integrity of the person, and
 - (b) before appointing a person, by way of promotion, as a non-executive police officer, to make inquiries (from the Police Integrity Commission, the Commander, Professional Standards Command, and from any other person or body the Commissioner thinks appropriate), as to the integrity of the person.
- (2) It is the duty of the Commissioner to have regard to any information that comes to the Commissioner's attention (whether as a result of inquiries under subsection (1) or otherwise) as to the integrity of a person referred to in that subsection.
- (3) The Police Integrity Commission, subject to the *Police Integrity Commission Act 1996*, and the Commander, Professional Standards Command, are required to furnish a report to the Commissioner (on the basis of information available to the Commission or the Commander and without the need for any special investigation or inquiry) on any person the subject of an inquiry referred to in subsection (1).
- (4) The Commissioner may change a decision to appoint a person under this Part before the person is appointed if the Commissioner receives information as to the person's integrity (being information that was not considered when the decision to appoint the person was made) which causes the Commissioner to form the opinion that the person is not a suitable person to be so appointed.
- (5) If the Commissioner changes such a decision, the Commissioner may decide, in accordance with this Part to appoint instead (from the persons who are eligible for appointment) the person who the Commissioner is of the opinion at the time has the greatest merit.

- (6) The Commissioner may suspend or remove a person from a promotion list or any part of a process relating to placement on a promotion list if the Commissioner receives information as to the person's integrity (being information that was not previously considered) which causes the Commissioner to form the opinion that the person is not a suitable person to remain on the list or be placed on the list.

72 Vacation of non-executive police officer positions

- (1) A non-executive police officer's position becomes vacant if the officer:
- (a) dies, or
 - (b) completes a term of office and is not appointed for a further term, or
 - (c) is removed from office, or retires or is retired from office, under this or any other Act, or
 - (d) resigns his or her position in writing addressed to the Commissioner, or
 - (e) abandons his or her employment in the NSW Police Force.
- (2) The retirement or resignation of a non-executive police officer does not take effect until:
- (a) the Commissioner accepts the retirement or resignation, or
 - (b) the officer has given the Commissioner at least 4 weeks' notice in writing of the day on which the officer intends to retire or resign and the officer is not under suspension from office on that day.

72A Incapable non-executive police officer may be retired

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.

73 Approval to engage in other paid employment

A non-executive police officer must not engage in any paid employment outside the duties of his or her position without the approval of the Commissioner.

Division 3 Term of office of non-executive commissioned police officers

74 Five year term contracts

- (1) Subject to this Act, a non-executive commissioned police officer holds office for the term of office specified in an instrument of appointment issued by the Commissioner for the purposes of this section.
- (2) The instrument operates as an appointment of the officer for the term of office so specified. The appointment is separate and distinct from the appointment of the officer

to the officer's non-executive police officer position by the Commissioner under section 64.

- (3) The term of office is to be 5 years or the officer's balance of service to retirement (whichever is shorter).
- (4) An officer's *balance of service to retirement* is the period up to the officer's projected date of retirement from the NSW Police Force, as determined by the Commissioner after consultation with the officer.

75 Entitlement to further terms

- (1) Until retirement, a non-executive commissioned police officer is entitled (if otherwise qualified) to appointment for a further term of office in accordance with section 74 on the expiration of each current term of office, unless the Commissioner has decided that the officer is not to be appointed for a further term and notified the officer of that decision at least 6 months before the expiration of the current term of office.
- (2) The appointment of an officer for a further term of office does not constitute an appointment to a vacant position for the purposes of Division 2.

76 Ground for decision not to re-appoint

- (1) The only ground for a decision by the Commissioner that a non-executive commissioned police officer is not to be appointed for a further term of office is that the officer is unable to meet required standards of operational competence, discipline or integrity.
- (2) The regulations may make provision for a review of a decision of the Commissioner under this section.

77 Performance reviews

A non-executive commissioned police officer's performance must be reviewed, at least annually, by the Commissioner or by some person nominated by the Commissioner. The review is to have regard to performance criteria determined by the Commissioner for the officer's position and any other relevant matter.

78 Promotion, transfer and re-appointment following resignation

- (1) When a non-executive commissioned police officer is appointed by way of promotion to another position in the NSW Police Force as a non-executive commissioned police officer, the officer is to be appointed for a new term of office in accordance with section 74 in the rank or grade within a rank to which the officer is promoted.
- (2) When a non-executive commissioned police officer is transferred to another position in the NSW Police Force as a non-executive commissioned police officer, the officer is not to be appointed for a new term of office, and the officer's existing term of office continues in the transferred position.
- (3) When a non-executive commissioned police officer is re-appointed under section 103 (Re-appointment of employees resigning to contest Commonwealth elections) of the *Public Sector Employment and Management Act 2002* the officer is to be appointed for a new term of office that is equivalent to the balance of the officer's term of office as at resignation.

79 Powers of dismissal, removal and suspension not affected

Nothing in this Division limits or otherwise affects any power under this Act to dismiss, suspend or remove a non-executive commissioned police officer.

Division 4 Appointment and promotion of constables

80 Appointment and promotion of constables

- (1) The Commissioner may, subject to this Act and the regulations, appoint any person of good character and with satisfactory educational qualifications as a police officer of the rank of constable.
- (2) A person when first appointed as such a police officer is to be appointed on probation in accordance with the regulations.
- (3) The Commissioner may dismiss any such probationary police officer from the NSW Police Force at any time and without giving any reason.
- (4) The promotion of police officers within the rank of constable is subject to the regulations.

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88 Industrial arbitration or legal proceedings excluded in relation to appointments

- (1) The appointment of or failure to appoint a person to a vacant non-executive position, or any matter, question or dispute relating to such an appointment or failure, is not an industrial matter for the purposes of the *Industrial Relations Act 1996*.
- (2) Subsection (1) applies whether or not any person has been appointed to a vacant non-executive position.
- (3) No proceedings for an order in the nature of prohibition, certiorari or mandamus, or for a declaration or injunction or for any other relief, lie in respect of the appointment of or failure to appoint a person to a vacant non-executive position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment.
- (4) Subsection (3) does not affect the operation of the *Government and Related Employees Appeal Tribunal Act 1980*.
- (5) The failure of a non-executive commissioned police officer to be appointed for a further term of office as provided by section 75 is for the purposes of this section taken to be a failure to appoint a person to a vacant non-executive position.
- (6) In this section:

non-executive position means the position of a member of the NSW Police Force to whom this Part applies.

vacant position, in relation to the position of a police officer or an administrative officer, has the same meaning as it has in Parts 6 and 6A, respectively.

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Division 1 Misconduct and unsatisfactory performance

173 Commissioner may take action with respect to police officer's misconduct or unsatisfactory performance

(1) In this section:

non-reviewable action means action referred to in Schedule 1.

reviewable action means action referred to in subsection (2), other than non-reviewable action.

(2) The Commissioner may order that the following action be taken with respect to a police officer who engages in misconduct:

- (a) a reduction of the police officer's rank or grade,
- (b) a reduction of the police officer's seniority,
- (c) a deferral of the police officer's salary increment,
- (d) any other action (other than dismissal or the imposition of a fine) that the Commissioner considers appropriate.

(3) The Commissioner may also order that action referred to in subsection (2) be taken with respect to a police officer whom the Commissioner has required to participate in a remedial performance program prescribed by the regulations and whose performance as a police officer after having participated in that program is, in the Commissioner's opinion, still unsatisfactory.

(4) The Commissioner may make an order under subsection (2) or (3) whether or not the misconduct or unsatisfactory performance has been the subject of a complaint under Part 8A and whether or not the police officer has been prosecuted or convicted for an offence in relation to the misconduct or unsatisfactory performance.

(5) Before making an order for reviewable action, the Commissioner:

- (a) must cause to be served on the police officer a notice that identifies the misconduct or unsatisfactory performance (including all relevant facts and circumstances) on the basis of which the Commissioner intends to make the proposed order, and
- (b) must give the police officer 7 days from the date of service of the notice within which to serve notice on the Commissioner that he or she intends to make written submissions to the Commissioner in relation to the proposed order, and

- (c) must take into consideration any written submissions received from the police officer:
 - (i) during the period of 7 days referred to in paragraph (b), or
 - (ii) if during that period the police officer serves notice on the Commissioner as referred to in paragraph (b), during the period of 21 days following the date on which that notice is served.
- (6) As soon as practicable after making an order for reviewable action, the Commissioner must cause written notice that the order has been made to be served on the police officer concerned. The notice must be served personally or (if personal service is impracticable) by post.
- (7) The written notice must contain the terms of the order and must indicate:
 - (a) the misconduct or unsatisfactory performance (including all relevant facts and circumstances) on the basis of which the order has been made, and
 - (b) whether the order results from a complaint that has been investigated, or is being investigated, under Division 5 of Part 8A, and
 - (c) the Commissioner's reasons for making the order.
- (8) An order for action referred to in subsection (2) takes effect:
 - (a) in the case of non-reviewable action, when the order is made, or
 - (b) in the case of reviewable action, at the expiry of the time within which an application for a review of the order may be made under section 174 or, if such an application is made within that time, when the application is finally determined.
- (9) Except as provided by Division 1A:
 - (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 GREAT and the Industrial Relations Commission.
- (10) Nothing in this section limits or otherwise affects the jurisdiction of the Supreme Court to review administrative action.
- (11) Nothing in Division 1A limits or otherwise affects the Commissioner's power to vary or revoke an order in force under this section.
- (12) Despite section 31, the Commissioner's functions under this section may only be delegated to a member of the NSW Police Force who is senior to the police officer in respect of whom those functions are being exercised.



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Division 1A Review of Commissioner's order under Division 1

174 Review generally

- (1) A police officer in respect of whom an order for reviewable action is made under section 173 may apply to the Industrial Relations Commission (referred to in this Division as the *Commission*) for a review of the order on the ground that the order is beyond power or is harsh, unreasonable or unjust.
- (2) An application may be made on behalf of the police officer by an industrial organisation of employees.
- (3) An industrial organisation of employees may make one application on behalf of a number of police officers in respect of whom orders for reviewable action have been made at the same time or for related reasons. However, this subsection does not prevent the Commission from hearing a number of applications together or individually.
- (4) An application may not be made by or on behalf of a police officer more than 21 days after the date on which written notice of the making of the order to which it relates was served on the police officer.
- (5) Except to the extent to which the regulations otherwise provide, it is the duty of the Commissioner to make available to the applicant, for inspection and copying, all of the documents and other material on which the Commissioner has relied, or to which the Commissioner has had regard, in deciding to make the order to which the application relates.

175 Proceedings on a review

- (1) The Commission is to commence hearing an application for a review under this Division within 4 weeks after the application is made.
- (2) The applicant has at all times the burden of establishing that the order to which the application relates is beyond power or is harsh, unreasonable or unjust. This subsection has effect despite any law or practice to the contrary.
- (3) In determining the applicant's claim, the Commission may take into account such matters as it considers relevant.
- (4) Without limiting the matters to which the Commission is otherwise required or permitted to have regard in making its decision, the Commission must have regard to:
 - (a) the interests of the applicant, and

- (b) the public interest (which is taken to include the fact that the Commissioner made the order pursuant to section 173).

176 Conciliation of applications

The Commission must endeavour, by all means it considers proper and necessary, to settle the applicant's claim by conciliation.

177 Arbitration where conciliation unsuccessful

- (1) When, in the opinion of the Commission, all reasonable attempts to settle the applicant's claim by conciliation have been made but have been unsuccessful, the Commission is to determine the application:
 - (a) by revoking the order, or
 - (b) by revoking the order and making such other order as it considers appropriate, whether or not an order that the Commissioner is empowered to make under section 173, or
 - (c) by upholding the order, or
 - (d) by dismissing the application.
- (2) If the Commission revokes the order, it may also direct the payment of compensation for any loss suffered by the applicant as a consequence of the making of the order.
- (3) An order made by the Commission under subsection (1) (b) is to be given effect to in accordance with its terms.
- (4) Nothing in this section prevents further conciliation from being attempted at any time before the Commission makes an order or direction under this section.

178 Rules of evidence and legal formality

- (1) The Commission:
 - (a) is not bound to act in a formal manner, and
 - (b) is not bound by the rules of evidence, but may inform itself on any matter in any way that it considers to be just, and
 - (c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
- (2) However, the rules of evidence and other formal procedures of a superior court of record apply to and in respect of the Commission in Court Session.

179 Application of Industrial Relations Act 1996

- (1) In the application of Part 5 of Chapter 4 of the *Industrial Relations Act 1996* to proceedings under this Division, the provisions of sections 163, 167, 169 (4), 172, 181 and 184 of that Act do not have effect.
- (2) Proceedings under this Division are to be dealt with by a judicial member of the Commission unless the President of the Commission otherwise directs under section 159 of the *Industrial Relations Act 1996*.

- (3) Despite section 160 of the *Industrial Relations Act 1996*, the President of the Commission may not delegate the President's functions under section 159 of that Act in respect of proceedings under this Division.

180 Matters relating to evidence

- (1) Section 128 (Privilege in respect of self-incrimination in other proceedings) of the *Evidence Act 1995* applies to and in respect of a witness giving evidence before the Commission in proceedings under this Division in the same way as it applies to and in respect of a witness giving evidence in proceedings before a court, and so applies as if a reference in that section to a court were a reference to the Commission.
- (2) Subject to section 178, nothing in this Division limits or otherwise affects the admissibility as evidence in proceedings under this Division of any transcript of the proceedings of any other court or tribunal.

181 Application of Division to both reviews and appeals from review decisions

This Division applies not only to proceedings before the Commission on a review under this Division but also to proceedings before the Full Bench of the Commission on an appeal from a decision of the Commission under this Division.

181A–181C (Repealed)

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Division 1B Summary removal of police officers in whom Commissioner does not have confidence

181D Commissioner may remove police officers

- (1) The Commissioner may, by order in writing, remove a police officer from the NSW Police Force if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct.
- (2) Action may not be taken under subsection (1) in relation to a Deputy Commissioner or Assistant Commissioner except with the approval of the Minister.
- (3) Before making an order under this section, the Commissioner:
 - (a) must give the police officer a notice setting out the grounds on which the Commissioner does not have confidence in the officer's suitability to continue as a police officer, and
 - (b) must give the police officer at least 21 days within which to make written submissions to the Commissioner in relation to the proposed action, and
 - (c) must take into consideration any written submissions received from the police officer during that period.
- (4) The order must set out the reasons for which the Commissioner has decided to remove the police officer from the NSW Police Force.
- (5) The removal takes effect when the order is made.
- (6) (Repealed)
- (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 GREAT and the Industrial Relations Commission.

- (7A) Nothing in this section limits or otherwise affects the jurisdiction of the Supreme Court to review administrative action.
- (7B) Nothing in Division 1C limits or otherwise affects the Commissioner's power to vary or revoke an order in force under this section.
- (8) For the purposes of this Act, removal of a police officer from the NSW Police Force under this section has the same effect as if the police officer had resigned (or, in the case of a police officer who is of or above the age of 55 years, had retired) from the NSW Police Force.
- (9) The Commissioner may take action under this section despite any action with respect to the removal or dismissal of the police officer that is in progress under some other provision of this Act and despite the decision of any court with respect to any such action.

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Division 1C Review of Commissioner's decision under Division 1B

181E Review generally

- (1) A police officer who is removed from the NSW Police Force by an order under section 181D may apply to the Industrial Relations Commission (referred to in this Division as the *Commission*) for a review of the order on the ground that the removal is harsh, unreasonable or unjust.
- (2) An application under this section does not operate to stay the operation of the order in respect of which it is made.
- (3) Except to the extent to which the regulations otherwise provide, it is the duty of the Commissioner to make available to the applicant all of the documents and other material on which the Commissioner has relied in deciding that the Commissioner does not have confidence in the applicant's suitability to continue as a police officer, as referred to in section 181D (1).

181F Proceedings on a review

- (1) In conducting a review under this Division, the Commission must proceed as follows:
 - (a) firstly, it must consider the Commissioner's reasons for the decision to remove the applicant from the NSW Police Force,
 - (b) secondly, it must consider the case presented by the applicant as to why the removal is harsh, unreasonable or unjust,
 - (c) thirdly, it must consider the case presented by the Commissioner in answer to the applicant's case.
- (2) The applicant has at all times the burden of establishing that the removal of the applicant from the NSW Police Force is harsh, unreasonable or unjust. This subsection has effect despite any law or practice to the contrary.
- (3) Without limiting the matters to which the Commission is otherwise required or permitted to have regard in making its decision, the Commission must have regard to:
 - (a) the interests of the applicant, and
 - (b) the public interest (which is taken to include the interest of maintaining the integrity of the NSW Police Force, and the fact that the Commissioner made the order pursuant to section 181D (1)).

181G Application of Industrial Relations Act 1996 to reviews

- (1) The provisions of the *Industrial Relations Act 1996* apply to an application for a review under this Division in the same way as they apply to an application under Part 6 (Unfair dismissals) of Chapter 2 of that Act, subject to this Division and to the following modifications:
 - (a) section 83 (Application of Part) is to be read as if subsection (3) were omitted,
 - (b) section 85 (Time for making applications) is to be read:
 - (i) as if a reference to 21 days in that section were instead a reference to 14 days, starting from the day on which the applicant is given a copy of the order to which the application relates, and
 - (ii) as if subsection (3) were omitted,
 - (c) section 86 (Conciliation of applications) is to be read as if it provided that a judicial member of the Commission who is involved in any endeavour to settle the applicant's claim by conciliation must not subsequently be involved in the conduct of proceedings on the review,
 - (d) section 89 is to be read as if subsection (7) (Threat of dismissal) were omitted,
 - (e) section 162 (Procedure generally) is to be read as if the requirement of subsection (2) (a) of that section that the Commission is to act as quickly as is practicable were instead a requirement for the Commission to commence hearing the application within 4 weeks after the application is made,
 - (f) section 163 (Rules of evidence and legal formality) is to be read as if it provided that new evidence may not be adduced before the Commission unless:
 - (i) notice of intention to do so, and of the substance of the new evidence, has been given in accordance with the regulations under this Act, or
 - (ii) the Commission gives leave.
- (2) The Commission may grant leave as referred to in subsection (1) (f) (ii) in such circumstances as it thinks fit and having regard to the nature of proceedings under section 181F, and without limiting the generality of the foregoing, the Commission must grant leave in the following circumstances:
 - (a) where the Commission is satisfied that there is a real probability that the applicant may be able to show that the Commissioner has acted upon wrong or mistaken information,
 - (b) where the Commission is satisfied that there is cogent evidence to suggest that the information before the Commissioner was unreliable, having been placed before the Commissioner maliciously, fraudulently or vexatiously,
 - (c) where the Commission is satisfied that the new evidence might materially have affected the Commissioner's decision.

181H Commissioner and members of Commissioner's Advisory Panels compellable witnesses only by leave

- (1) In any proceedings before the Commission under this Division, neither the Commissioner nor any member of a Commissioner's Advisory Panel is compellable to

give evidence in relation to the exercise of the Commissioner's functions under section 181D unless the Commission gives leave.

- (2) The Commission may give such leave only if it considers that extraordinary grounds exist that warrant leave being given.
- (3) In this section, *Commissioner's Advisory Panel* means a panel established by the Commissioner to assist in the exercise of the Commissioner's functions under section 181D.

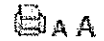
181I Matters relating to evidence

- (1) Section 128 (Privilege in respect of self-incrimination in other proceedings) of the *Evidence Act 1995* applies to a witness giving evidence before the Commission in proceedings under this Division in the same way as it applies to a witness giving evidence in proceedings before a court, and so applies as if a reference in that section to a court were a reference to the Commission.
- (2) Subject to subsection (1) of section 163 (Rules of evidence and legal formality) of the *Industrial Relations Act 1996*, nothing in this Division limits or otherwise affects the admissibility in evidence in proceedings before the Commission under this Division of any transcript of the proceedings of any other court or tribunal.

181J Application of Division to both reviews and appeals from review decisions

This Division applies not only to proceedings before the Commission on a review under this Division but also to proceedings before the Full Bench of the Commission on an appeal from a decision of the Commission under this Division.

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Division 1D Constitution of Industrial Relations Commission for the purposes of proceedings under this Part

181K Constitution of Commission for the purposes of Division 1C

- (1) A review under Division 1C is to be conducted before the Industrial Relations Commission (referred to in this Division as the *Commission*) constituted by a single judicial member.
- (2) An appeal from the decision of the Commission on a review under Division 1C is to be conducted before a Full Bench of the Commission constituted by 3 judicial members.
- (3) Proceedings on a review under Division 1C, or on an appeal from the decision of the Commission on a review under Division 1C, are taken not to be proceedings of the Commission in Court Session.

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218 Industrial Relations Act 1996 not affected

- (1) The *Industrial Relations Act 1996* is not affected by anything in this Act.
- (2) Subsection (1) does not limit section 44 or 89 or any provision of the *Industrial Relations Act 1996*.

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Schedule 1

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Schedule 1 Non-reviewable action

(Section 173)

coaching
mentoring
training and development
increased professional, administrative or educational supervision
counselling
reprimand
warning
retraining
personal development
performance enhancement agreements
non-disciplinary transfer
change of shift (but only if the change results in no financial loss and is imposed for a limited period and is subject to review)
restricted duties
recording of adverse findings

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Police Regulation 2008

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[Part 2](#) » [Division 2](#) » Clause 12

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12 Appointment of constables on probation

- (1) In accordance with section 80 (2) of the Act, a person when first appointed as a police officer of the rank of constable is to be appointed on probation:
 - (a) for a period of 1 year, or
 - (b) for such longer or shorter period (being not less than 6 months) as the Commissioner may direct in the case of that person.
- (2) Despite subclause (1), the Commissioner may direct that the period of probation be less than 6 months, or may waive the period of probation completely, if the person has previously served as a police officer in the NSW Police Force or in any other police service or police force (however called).
- (3) All or any part of such previous service may, with the approval of the Commissioner, be counted towards seniority.

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Police Regulation 2008

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[Part 2](#) > [Division 2](#) > Clause 13

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13 Confirmation of appointment as constable

Confirmation of appointment in the rank of constable is subject to:

- (a) the successful completion of initial basic training, as determined by the Commissioner, and
- (b) the completion of the period of probation, and
- (c) a satisfactory fitness report, and
- (d) the other requirements of this Division.

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Police Regulation 2008

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14 Fitness report for probationary constables

- (1) The appointment of a probationary constable is not to be confirmed unless a police officer designated by the Commissioner has reported that the probationary constable is fit to discharge satisfactorily the duties of constable.
- (2) Any such fitness report is to deal with the probationary constable's:
 - (a) medical fitness, as indicated by a health assessment referred to in clause 10, and
 - (b) aptitude for the discharge of the duties of constable, and
 - (c) competence, integrity, performance and conduct.
- (3) If on the day on which the Commissioner would otherwise confirm his or her appointment the probationary constable is medically unfit but satisfies all other requirements, the Commissioner may confirm the appointment on and from the day the probationary constable is certified medically fit by a medical practitioner.
- (4) The seniority of a constable whose appointment is confirmed in accordance with subclause (3) is to be determined:
 - (a) if the constable's medical unfitness was due to any wound, injury or sickness occasioned in the actual execution of duty, as though the appointment had been confirmed:
 - (i) on the day on which it would have been confirmed but for the constable's medical unfitness, or
 - (ii) if that day occurred more than 12 months before the day on which the appointment was actually confirmed, on the day occurring 12 months before the day on which it was actually confirmed, or
 - (b) if the constable's medical unfitness was not due to any wound, injury or sickness occasioned in the actual execution of duty, as though the appointment had been confirmed:
 - (i) on the day on which it would have been confirmed but for the constable's medical unfitness, or
 - (ii) if that day occurred more than 9 months before the day on which the appointment was actually confirmed, on the day occurring 9 months before the day on which it was actually confirmed.



NEW SOUTH WALES POLICE

RULES AND INSTRUCTIONS

Issued 1915—Revised 1935
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Revised 1977

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G 23641—1

Line of responsibility 10. (1) When members of the Force are engaged on duty together, the senior member shall be responsible for the duty jointly done, and the other members shall comply with his directions, irrespective of whether they belong to the same District, Division, Branch, Section or Squad.

(2) When a member of the Force subordinate in rank to Assistant Commissioner is absent, the duties of the absent member shall devolve upon the member next junior to that member and present, unless otherwise duly directed.

PART III.

CONDITIONS AND REQUIREMENTS OF SERVICE.

Conditions of service. 11. Each member admitted to the Force after the commencement of these Rules is admitted upon the following conditions, and each member admitted to the Force before that commencement continues to be a member upon the following conditions, namely—

- Period of probation. (a) he shall be engaged upon probation for 1 year from the date of his appointment, or for such longer or shorter period (being not less than 6 months) as the Commissioner specifies in respect of him;
- Discharge of Probationary Constable. (b) he may be discharged or dismissed by the Commissioner during the period of his probation without any reason being assigned;
- Medical Examination (c) he must be medically examined by the Police Medical Officer prior to the completion of his probation and at any other time when directed by the Commissioner;
- Obedience. (d) he shall strictly comply with these Rules and the Police Instructions and promptly obey all lawful orders from those in authority over him;
- Performance of duty. (e) he shall be presumed to know his duty in every case, and, unless otherwise duly directed, is responsible for the due performance thereof;
- Honesty and truthfulness. (f) he shall at all times exercise the strictest honesty and truthfulness, and in particular he shall not—
 (i) wilfully or negligently make any false, misleading or incorrect statement;
 (ii) knowingly make or sign any false statement in any official document, record or book; or
 (iii) without good and sufficient cause, destroy or mutilate any official document, record or book, or alter or erase any entry therein;
- Liability to dismissal or other punishment. (g) he is liable to dismissal or other punishment for disobedience, neglect or omission of duty, incompetency, intemperance, being under the influence of intoxicating liquor while on duty or while in uniform, disrespect to any person in authority, insolent or indecorous behaviour, any words or actions subversive of discipline or calculated to impair the efficiency of, or bring discredit upon, the Force, or any misconduct punishable by law or contrary to these Rules or the Police Instructions;



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3 Objects

The objects of this Act are as follows:

- (a) to provide a framework for the conduct of industrial relations that is fair and just,
- (b) to promote efficiency and productivity in the economy of the State,
- (c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,
- (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,
- (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
- (f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,
- (g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,
- (h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

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4 Dictionary

- (1) Expressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings given to them in the Dictionary.
- (2) Key expressions used in this Act are defined in the following provisions of this Chapter.

Note. Some expressions used in this Act are defined in the *[Interpretation Act 1987](#)*, and have the meanings given to them in that Act.

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5 Definition of employee

(1) General definition

In this Act, *employee* means:

- (a) a person employed in any industry, whether on salary or wages or piece-work rates, or
- (b) any person taken to be an employee by subsection (3).

(2) A person is not prevented from being an employee only because:

- (a) the person is working under a contract for labour only, or substantially for labour only, or
- (b) the person works part-time or on a casual basis, or
- (c) the person is the lessee of any tools or other implements of production, or
- (d) the person is an outworker, or
- (e) the person is paid wholly or partly by commission (such as a person working in the capacity of salesperson, commercial traveller or insurance agent).

(3) Deemed employees

The persons described in Schedule 1 are taken to be employees for the purposes of this Act. Any person described in that Schedule as the employer of such an employee is taken to be the employer.

(4) Exclusion

A person employed or engaged by his or her spouse, de facto partner or parent is not an employee for the purposes of this Act.

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6 Definition of industrial matters

(1) General definition

In this Act, *industrial matters* means 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.

(2) Examples

Examples of industrial matters are as follows:

- (a) the employment of persons in any industry (including the employment of minors, trainees, apprentices and other classes of employees),
- (b) the remuneration (including rates of pay, rates for piece-work and allowances) for employees in any industry,
- (c) the conditions of employment in any industry (including hours of employment, qualifications of employees, manner of work and quantity of work to be done),
- (d) part-time or casual employment (including part-time work agreements),
- (e) the termination of employment of (or the refusal to employ) any person or class of persons in any industry,
- (f) discrimination in employment in any industry (including in remuneration or other conditions of employment) on a ground to which the *Anti-Discrimination Act 1977* applies,
- (g) procedures for the resolution of industrial disputes,
- (h) the established customs in any industry,
- (i) the authorised remittance by employers of membership fees of industrial organisations of employees,
- (j) the surveillance of employees in the workplace,
- (k) the mode, terms and conditions under which work is given out, whether directly or indirectly, to be performed by outworkers in the clothing trades.

Note. The *Apprenticeship and Traineeship Act 2001* deals with apprenticeships and traineeships. Section 80 of that Act provides that that Act (and regulations, orders and directions under that Act) prevail over this Act (and regulations, orders, awards and agreements under this Act) to the extent of any inconsistency.



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83 Application of Part

- (1) This Part applies to the dismissal of:
 - (a) any public sector employee, or
 - (b) any other employee, except an employee for whom conditions of employment are not set by an industrial instrument and whose annual remuneration is greater than \$62,200 (or such greater amount as is prescribed by the regulations).
- (1A) This Part applies to the dismissal of an employee even if the person was employed in this State under a Federal award. However, this Part does not apply to the dismissal of any such employee if:
 - (a) the person is entitled to make an application to the Australian Industrial Relations Commission with respect to the dismissal on the ground that it was harsh, unjust or unreasonable, or
 - (b) the person would have been entitled to make such an application but for the exclusion of the person from the relevant provisions of the *Workplace Relations Act 1996* of the Commonwealth (being an exclusion of a kind referred to in subsection (2)).
- (2) This Part does not apply to an employee who is exempted from this Part by the regulations. Any such regulation may only exempt specified classes of employees included in any of the following classes:
 - (a) employees engaged under a contract of employment for a specified period of time or a specific task,
 - (b) employees serving a period of probation or qualifying period,
 - (c) employees engaged on a casual basis for a short period,
 - (d) employees whose terms and conditions of employment are governed by special arrangements providing particular protection in respect of termination of employment either generally or in particular circumstances,
 - (e) employees in relation to whom the operation of the provisions of this Part causes or would cause substantial problems because of:
 - (i) their particular conditions of employment, or
 - (ii) the size or nature of the undertakings in which they are employed.

- (3) This Part does not apply to the dismissal of any such employee who is an apprentice or trainee (other than an existing worker trainee) within the meaning of the *Apprenticeship and Traineeship Act 2001* or any such employee who is an executive officer to whom Part 2A of the *Public Sector Management Act 1988* or Part 5 of the *Police Service Act 1990* applies.
- (4) This Part applies to the dismissal of an employee even though it occurred in the course of an industrial dispute and the Commission is otherwise authorised under this Act to order the reinstatement of the employee.

- (5) In this Part:

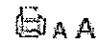
dismissal includes:

- (a) the threat of dismissal, and
- (b) in the case of a public sector employee—dispensing with the services of the employee, dismissing the employee as a consequence of disciplinary proceedings against, or the commission of an offence by, the employee or annulling the appointment of the employee.

Federal award means an award within the meaning of the *Workplace Relations Act 1996* of the Commonwealth.

industrial instrument includes a Federal award or other Federal industrial instrument.

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84 Application for remedy by dismissed employee

- (1) If an employer dismisses an employee and the employee claims that the dismissal is harsh, unreasonable or unjust, the employee may apply to the Commission for the claim to be dealt with under this Part.
- (2) An application may be made on behalf of the employee by an industrial organisation of employees.
- (3) An industrial organisation may make one application on behalf of a number of employees who were dismissed at the same time or for related reasons. However, this subsection does not prevent the Commission from hearing a number of applications under this Part together or individually.
- (4) An application may be made under this Part even though the applicant does not specify the nature of the remedy sought or requests compensation only. However, this subsection does not affect the requirement under this Part that compensation is available only if the Commission considers that reinstatement or re-employment would be impracticable.

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85 Time for making applications

- (1) An application under this Part must be made not later than 21 days after the dismissal of the employee.
- (2) The Commission is required to accept an application that is made out of time if the applicant has previously made a similar application under Commonwealth law relating to the same dismissal and:
 - (a) the similar application was made within the time required by that Commonwealth law, and
 - (b) the similar application has not been settled or determined, and
 - (c) the application under this Part is made not later than 21 days after the similar application is withdrawn, or is declined because of the existence of an alternative remedy under this Part.
- (3) The Commission may accept an application that is made out of time if the Commission considers there is a sufficient reason to do so, having regard in particular to:
 - (a) the reason for, and the length of, the delay in making the application, and
 - (b) any hardship that may be caused to the applicant or the employer if the application is or is not rejected, and
 - (c) the conduct of the employer relating to the dismissal.

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86 Conciliation of applications

The Commission must endeavour, by all means it considers proper and necessary, to settle the applicant's claim by conciliation.

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87 Arbitration where conciliation unsuccessful

- (1) When, in the opinion of the Commission, all reasonable attempts to settle the applicant's claim by conciliation have been made but have been unsuccessful, the Commission is to determine the claim by making an order under section 89, dismissing the application or making any other order it is authorised to make under this Act.
- (2) Nothing in this section prevents further conciliation from being attempted at any time before the Commission makes such an order.

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88 Matters to be considered in determining a claim

In determining the applicant's claim, the Commission may, if appropriate, take into account:

- (a) whether a reason for the dismissal was given to the applicant and, if the applicant sought but was refused reinstatement or re-employment with the employer, whether a reason was given for the refusal to reinstate or re-employ, and
- (b) if any such reason was given—its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment, and
- (c) whether a warning of unsatisfactory performance was given before the dismissal, and
- (d) the nature of the duties of the applicant immediately before the dismissal and, if the applicant sought but was refused reinstatement or re-employment, the likely nature of those duties if the applicant were to be reinstated or re-employed, and
- (e) whether or not the applicant requested reinstatement or re-employment with the employer, and
- (f) such other matters as the Commission considers relevant.

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89 Orders for reinstatement, re-employment, remuneration, compensation

(1) Reinstatement

The Commission may order the employer to reinstate the applicant in his or her former position on terms not less favourable to the applicant than those that would have been applicable if the applicant had not been dismissed.

(2) Re-employment

If the Commission considers that it would be impracticable to reinstate the applicant, the Commission may order the employer to re-employ the applicant in another position that the employer has available and that, in the Commission's opinion, is suitable.

(3) Remuneration

If the Commission orders reinstatement or re-employment, it may order the employer to pay to the applicant an amount stated in the order that does not exceed the remuneration the applicant would, but for being dismissed, have received before being reinstated or re-employed in accordance with the order.

(4) Continuity

If the Commission orders reinstatement or re-employment, it may order that the period of employment of the applicant with the employer is taken not to have been broken by the dismissal.

(5) Compensation

If the Commission considers that it would be impracticable to make an order for reinstatement or re-employment, the Commission may order the employer to pay to the applicant an amount of compensation not exceeding the amount of remuneration of the applicant during the period of 6 months immediately before being dismissed. If the applicant was on leave without full pay during any part of that period, the maximum amount of compensation is to be determined as if the applicant had received full pay while on leave.

(6) When assessing any compensation payable, the Commission is to take into account whether the applicant made a reasonable attempt to find alternative employment and the remuneration received in alternative employment, or that would have been payable if the applicant had succeeded in obtaining alternative employment.

(7) Threat of dismissal

In determining a claim relating to a threat of dismissal, the Commission may order the employer not to dismiss the employee in accordance with that threat.

(8) An order under this section may be made on such terms and conditions as the Commission determines.

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90 Effect of availability of other remedies

The Commission must not determine an applicant's claim by making an order under section 89 if:

- (a) another Act or a statutory instrument provides for redress to the person in relation to the dismissal, and
- (b) the person has commenced proceedings under the other Act or instrument or has not lodged a written undertaking not to proceed under the other Act or instrument.

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145 Establishment of Commission

- (1) There is established by this Act the Industrial Relations Commission of New South Wales.
- (2) The Commission is to have a seal and the seal is to be judicially noticed.

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146 General functions of Commission

- (1) The Commission has the following functions:
 - (a) setting remuneration and other conditions of employment,
 - (b) resolving industrial disputes,
 - (c) hearing and determining other industrial matters,
 - (d) inquiring into, and reporting on, any industrial or other matter referred to it by the Minister,
 - (e) functions conferred on it by this or any other Act or law.
- (2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:
 - (a) the objects of this Act, and
 - (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

This subsection does not apply to proceedings before the Commission in Court Session that are criminal proceedings or that it determines are not appropriate.

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405 Statutory provisions relating to public sector employees

- (1) Any award or order of the Commission does not have effect to the extent that it is inconsistent with:
 - (a) a right of appeal under the *Government and Related Employees Appeal Tribunal Act 1980* or the *Police Service Act 1990*, or
 - (b) 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.
- (2) The regulations may provide that an award or order of the Commission has effect despite any right or function referred to in subsection (1).
- (3) This section does not affect any decision of the Commission under Part 6 of Chapter 2 (Unfair dismissals).

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Dictionary

(Section 4)

Australian Industrial Relations Commission means the Australian Industrial Relations Commission constituted under the *Workplace Relations Act 1996* of the Commonwealth, and includes any successor to that tribunal.

award means an award made, or taken to be made, by the Commission under this Act, and includes any order of the Commission under this Act that sets conditions of employment.

bailor—see section 308.

Commission means the Industrial Relations Commission of New South Wales established by this Act.

Commission in Court Session means the Commission constituted as referred to in section 151.

committee of management of an organisation, means the group or body of persons (however described) that manages the affairs of the organisation.

conditions of employment includes any provisions about an industrial matter.

contract agreement means an agreement approved, or taken to be approved, by the Commission under Part 3 of Chapter 6.

contract determination means a contract determination made, or taken to be made, by the Commission under Part 2 of Chapter 6.

contract of bailment—see section 307.

contract of carriage—see section 309.

de facto partner, in relation to a person, means the other party to a de facto relationship (within the meaning of the *Property (Relationships) Act 1984*) with the person.

dispute order—see Part 2 of Chapter 3.

employee—see section 5.

employer means a person who employs an employee within the meaning of this Act:

- (a) whether the person is an individual, a corporation, an unincorporated body or the State, and
- (b) whether the person does so on the person's own behalf or on behalf of some other person.

enterprise agreement means an enterprise agreement approved, or taken to be approved, by the Commission under this Act.

exercise a function includes perform a duty.

former industrial agreement—see clause 6 of Schedule 4.

function includes a power, authority or duty.

industrial action means a strike by employees or a lock-out by an employer, and includes:

- (a) a practice relating to the performance of work, adopted in connection with an industrial dispute, that restricts, limits or delays the performance of work, or
- (b) a ban, limitation or restriction affecting the performance of work, or the offering or acceptance of work, that is adopted in connection with an industrial dispute, or
- (c) any failure or refusal in connection with an industrial dispute to attend for work or to perform work,

but does not include any action taken by employees with the agreement of their employer or any action taken by employers with the agreement of their employees.

industrial agent means a person (other than an Australian legal practitioner or an employee or officer of an industrial organisation) who represents a party in proceedings before the Commission for fee or other reward.

industrial agent service means any service performed by a person in the person's capacity as an industrial agent.

Industrial Committee means an Industrial Committee of the Commission established, or taken to be established, under this Act.

industrial dispute means a dispute (including a question or difficulty) about an industrial matter, and includes the following:

- (a) a demarcation dispute,
- (b) a threatened or likely industrial dispute,
- (c) a situation that is likely to give rise to an industrial dispute if preventative action is not taken.

Industrial Gazette means the publication of that name published under the authority of the Industrial Registrar.

industrial instrument—see section 8.

industrial matters—see section 6.

industrial organisation means an industrial organisation of employees or an industrial organisation of employers.

industrial organisation of employees means an industrial organisation of employees registered, or taken to be registered, under Chapter 5.

industrial organisation of employers means an industrial organisation of employers registered, or taken to be registered, under Chapter 5.

Industrial Registrar means the Industrial Registrar referred to in section 207.

industrial relations legislation means any of the following Acts and the regulations made under any such Act:

This Act

Annual Holidays Act 1944

Employment Protection Act 1982

Long Service Leave Act 1955

Long Service Leave (Metalliferous Mining Industry) Act 1963.

industry—see section 7.

inspector means an inspector appointed for the purposes of this Act.

judicial member of the Commission means a member of the Commission in Court Session.

member of the family of a person, means (in section 265 and Chapter 6) the person's spouse (including a person with whom the person has a de facto relationship), parent, grandparent, child or sibling, any such relative by marriage or de facto relationship and any step-parent or step-child (with *de facto relationship* having the same meaning in this definition as in the Property (Relationships) Act 1984).

motor vehicle means a motor vehicle or trailer within the meaning of the Road Transport (General) Act 2005.

NSW industrial relations website—see section 208A.

office in an organisation, means:

- (a) an office of president, vice-president, secretary or assistant secretary of the organisation, or
- (b) the office of a voting member of a collective body of the organisation, being a collective body that has power in relation to any of the following functions:
 - (i) the management of the financial or other affairs of the organisation,
 - (ii) the determination of policy for the organisation,
 - (iii) the making, alteration or rescission of rules of the organisation,
 - (iv) the enforcement of rules of the organisation, or the performance of functions in relation to the enforcement of such rules, or
- (c) an office the holder of which is, under the rules of the organisation, entitled to participate directly in any of the functions referred to in paragraph (b) (i) or (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing existing policy of the organisation or decisions concerning the organisation, or
- (d) an office the holder of which is, under the rules of the organisation, entitled to participate directly in any of the functions referred to in paragraph (b) (ii) or (iii), or
- (e) the office of a person holding (whether as trustee or otherwise) property of the organisation or property in which the organisation has a beneficial interest.

officer of an organisation means a person who holds an office in the organisation.

outworker in the clothing trades means a person described in clause 1 (f) of Schedule 1 as an employee.

Note. A person described in clause 1 (f) of Schedule 1 as an employee is taken to be an employee for the purposes of this Act by section 5 (3).

party to an industrial instrument includes the successor of a party to the instrument.

pay equity means equal remuneration for men and women doing work of equal or comparable value.

penalty unit see section 17 of the Crimes (Sentencing Procedure) Act 1999.

Note. Penalties for offences are expressed in penalty units. At the time of this update the penalty unit was \$110.

premises includes any mine, structure, building, aircraft, vehicle, vessel and place (whether built on or not), and any part of it.

Presidential Member of the Commission—see section 147 (2).

principal contractor—see section 310.

public sector employee includes an employee of a public authority and a member of the Government Service, the NSW Police Force, the NSW Health Service or the Teaching Service.

public sector industrial agreement means an agreement under section 64 of the Public Sector Management Act 1988, section 86 of the Police Service Act 1990, section 14 of the Teaching Service Act 1980 or section 26 (4) of the Area Health Services Act 1986 or any similar kind of agreement relating to public sector employees.

public vehicle means a taxi-cab or private hire vehicle within the meaning of the Passenger Transport Act 1990.

resolution of an industrial dispute includes the avoidance or settlement of the dispute.

rules of an organisation includes, in the case of an organisation that is a company, the memorandum or articles of association of the organisation.

State peak council means:

- (a) Unions NSW (being the State peak council for employees), or
- (b) an organisation approved for the time being by the Commission under section 216 as a State peak council for employers.

successor includes transferee, assignee, devisee or other successor at law.

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6 Other exemptions from unfair dismissal provisions

- (1) For the purposes of section 83 (2) of the Act, the following classes of employees are exempted from Part 6 of Chapter 2 of the Act:
 - (a) employees engaged under a contract of employment for a specified period of time, if the specified period is less than 6 months,
 - (b) employees engaged under a contract of employment for a specific task,
 - (c) employees serving a period of probation or qualifying period, if the duration of the period, or the maximum duration of the period, is determined in advance and either:
 - (i) the period, or the maximum duration, is 3 months or less, or
 - (ii) if the period, or the maximum duration, is more than 3 months—the period, or the maximum duration, is reasonable having regard to the nature and circumstances of the employment,
 - (d) employees engaged on a casual basis for a short period except employees who:
 - (i) are engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months, and
 - (ii) would, but for the dismissal, have had a reasonable expectation of continuing employment with the employer.
- (2) This clause applies only with respect to dismissals under contracts of employment entered into on or after 1 October 1997.

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