IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S230 of 2012

BETWEEN:

COMMISSIONER OF POLICE
Appellant

and

DAVID GRANT EATON
First Respondent

INDUSTRIAL RELATIONS COMMISSION OF NSW
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Publication of Submissions

1. The first respondent certifies that these submissions are in a form suitable for publication on the Internet.

Part II: The Issues

2. The first question in this appeal is whether s 80(3) of the *Police Act 1990* (NSW) (**Police Act**), either by itself or in combination with Pt 9 of the Police Act, should be construed as excluding the jurisdiction of the Industrial Relations Commission of NSW (**IRC**) under Pt 6 of Ch 2 of the *Industrial Relations Act 1996* (**IR Act**).

3. If the answer to the first question is yes, the question arises as to whether s 218 of the Police Act should be construed as negating such exclusion of the jurisdiction of the IRC.

Part III: Section 78B of the Judiciary Act 1903

4. The first respondent certifies that consideration has been given to whether any s 78B notice should be given and considers that no notice is required.

Part IV: Material Facts

5. The first respondent does not contest the facts stated in Part V by the appellant.

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Part V: Relevant Legislation and Regulations

6. The first respondent accepts that the Acts and Regulations which the appellant has identified are applicable.

7. The statutory provisions relevant to the proceeding are set out in some detail in the Court of Appeal decision[1].

8. In developing the argument below, the first respondent relies upon some additional predecessor provisions of the Police Act which are annexed to these submissions.

Part VI: First Respondent's Argument

9. In summary, the first respondent's response to the argument of the appellant is that:

   (a) A consideration of the actual statutory language leads to the conclusion that there is no inconsistency or no such inconsistency that it could be concluded that the operation of s 80(3) of the Police Act, either by itself or in combination with Pt 9 of the Police Act, cannot "stand or live together (or cannot be 'reconciled')"[2] with the exercise of the jurisdiction of the IRC under Pt 6 of Ch 2 of the IR Act.

   (b) Assuming, without conceding, that the appellant has demonstrated that probationary police officers have superior rights of merit review compared to confirmed police officers as a result of the introduction of the removal provisions of Pt 9 of the Police Act, such demonstration does not assist in determining whether the legislature intended to deny probationary police officers any rights of merit review. Alternatively, comparison of the rights of review of probationary police officers under Pt 6 of Ch 2 of the IR Act taken as a whole with the rights of review of confirmed police officers under Pt 9 of the Police Act taken as a whole does not demonstrate any, or any significant, superiority.

   (c) In any event, s 218 of the Police Act negates any effect that s 80(3) of the Police Act, either by itself or in combination with Pt 9 of the Police Act, has in excluding the jurisdiction of the IRC under Pt 6 of Ch 2 of the IR Act.

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[1] Court of Appeal Judgment (CA) [52] to [83]
[2] See *Ferdinands v Commissioner of Public Employment* (2006) 225 CLR 130 at [18] per Gleeson CJ

Section 80(3) of the Police Act

10. The anchor of the appellant's argument is s 80(3) of the Police Act[3], which gives the appellant power to dismiss probationary police officers. However, in arguing that there is inconsistency between s 80(3) and Pt 6 of Ch 2 of the IR Act, the appellant overlooks the difference between the power to dismiss and the power to review a dismissal.

11. There is no reason why the IRC's power to review a dismissal should be construed as limited by the fact the power to dismiss exists. Section 80(3) of the Police Act in effect provides no more than a statutory power to the appellant similar to the exercise of the power of dismissal held by employers at common law. The exercise of such a power attracts rather than excludes Pt 6 of Ch 2 of the IR Act; indeed it is a necessary precursor to the exercise of those powers.

12. Pt 6 of Ch 2 of the IR Act does not deprive an employer of the power of dismissal or prevent it being exercised. Rather, it operates on and after an exercise of the power of dismissal, which can be reviewed and in appropriate cases reversed[4]. An unfair dismissal application involves a separate process from the decision to dismiss and does not render the dismissal unlawful or invalid. The appellant's comments on the reasoning of the Court of Appeal[5] ignore this consideration in the Court of Appeal judgment[6].

13. The appellant relies on the absence of an obligation to give reasons in s 80(3) of the Police Act as creating an inconsistency with Pt 6 of Ch 2 of the IR Act[7]. However, there is no duty at common law to give reasons[8]. Moreover, the fact that no reasons are given for a decision does not mean that it cannot be challenged[9]. Further, the reasons identified in s88 of the IR Act are only matters that the IRC "may, if appropriate, take into account". If no reasons are given, there is no need to take them into account. Section 80(3) provides that reasons need not be given,

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[3] Appellant's Submissions (**AS**) [11] to [22]
[4] CA [44]
[5] AS [22]
[6] CA [43] to [45], [166] to [171]
[7] AS [12a]
[8] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 662.6-667.5
[9] Ibid at 663.9,

but that does not mean that reasons do not exist. Section 80(3) of the Police Act does not preclude reasons being given and, if given, as they were in this case, being considered.

14. Reference by the appellant to the provisions in Pt 9 of the Police Act where reasons are required after the provision of notice[10] only reinforces the point that these matters are not determinative of whether there is jurisdiction under Pt 6 of Ch 2 of the IR Act.

15. The provisions in Pt 9 of the Police Act relating to the removal of police officers and remedies for such removal do not impact on or interact with the separate power to dismiss probationary police officers and the remedies available to challenge such dismissal, in the absence of such an impact being expressly provided for in the legislation. If the legislature had intended that probationary police officers should be excluded from the jurisdiction of the IRC in relation to unfair dismissal, it could easily have evinced this intention in the same way as it has done in relation to other employees elsewhere in the Police Act[11]. The "contrasting provision"[12] relevant to executive officers is s 44(2A) of the Police Act which excludes the jurisdiction of the IRC under Pt 6 of Ch 2 of the IR Act.

16. It is reflective of the relationship between the Police Act and the IR Act generally intended by the legislature, and as to the operation of Pt 6 of Ch 2 in particular, that in addition to s 44(2A) of the Police Act, s 83(3) of the IR Act itself excludes Pt 6 of Ch 2 from applying to "the dismissal of any ... employee who is an executive officer to whom ... Part 5 of the Police Act 1990 applies". Section 83(1)(a) of the IR Act otherwise confirms that Pt 6 of Ch 2 applies to "any public sector employee", which is expressly defined so as to include "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"[13] (emphasis added). A probationary police officer is a member of the NSW Police Force[14].

17. Further the provisions of s 181D(7) of the Police Act demonstrate that the legislature, when introducing the removal provisions of Pt 9 of the Police Act, expressly turned its mind to the question of excluding the application of Pt 6 of Ch

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[10] AS [13]
[11] CA [108]
[12] Cf AS [13b]
[13] See s 4 of the IR Act and the Dictionary definition of "public sector employee"

2 of the IR Act and did not do so in the case of dismissal of probationary employees. There is no basis to suggest that the legislature, having directly and expressly turned its mind to the issue of the circumstances in which the jurisdiction of the IRC should be excluded, intended tacitly or impliedly to affect the merit rights of review of dismissals of probationary police officers under the IR Act. Indeed Parliament has given legislative attention in the Police Act to its relationship with the industrial legislation on numerous occasions without excluding probationary police officers from the unfair dismissal regime[15]. The "unanswerable fact"[16] is that the drafters of the Police Act and the IR Act have been conscious of their potential interaction and in particular respects, not limited to the operation of Pt 6 of Ch 2, have made specific and express provision accordingly[17].

18. For the reasons set out above, it should be concluded that there is no inconsistency between s 80(3) and Pt 6 of Ch 2 of the IR Act.

19. Even if there is inconsistency, it is not sufficient for the appellant to succeed to merely point to[18] the circumstance that "different considerations inform the exercise of power under the Police Act from those that inform the exercise of power under the wrongful dismissal provisions of the Industrial Act" by reference to the judgment of Gummow and Hayne JJ in *Ferdinands v Commissioner of Public Employment*[19] (***Ferdinands***) at [51]. That was only one of the considerations that their Honours said (at [54]) "(s)tanding alone... would not demonstrate explicit or implicit contradiction between the two Acts".

20. The additional considerations present in the legislation considered in *Ferdinands* are not found in the NSW legislation. The South Australian police legislation considered in *Ferdinands* expressly provided for an "elaborate system of merits review"[20] of dismissals and a "comprehensive statement" of matters associated with dismissals[21] for both probationary and non-probationary police officers[22] that

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[14] See s 5(c) of the Police Act.
[15] CA [28]
[16] Cf AS [24]
[17] See CA [42] and [46]
[18] AS [20]
[19] (2006) 225 CLR 130
[20] Ibid at [10]
[21] Ibid at [57]
[22] Ibid at [43]

gave the "appearance of exhaustiveness on the subject of termination"[23]. However, in NSW the Police Act does not provide for a merits review of dismissals of probationary police officers.

21. Indeed, unlike the South Australian legislation, the Police Act does not provide at all for a merits review of dismissals because, in the case of confirmed police officers the power of dismissal was deleted from the Police Act[24] after the removal provisions of Pt 9 were introduced in 1997[25]. While Pt 9 of the Police Act introduced a system of merits review for a removal of a police officer, pursuant to s 181D(8) of the Police Act a removal is treated as a resignation and not as a dismissal for the purposes of the Police Act.

22. If Divisions 1B and 1C of Pt 9 of the Police Act do not apply to probationary police officers, as accepted by the appellant, there is no basis for implying a legislative intent that Pt 9 was designed to deal comprehensively with the question of the termination of the appointment of all police officers including probationary police officers[26]. Indeed the Second Reading Speech to the Bill that introduced the removal provisions in Pt 9 of the Police Act[27], which is annexed to these submissions, makes no mention of affecting the jurisdiction of the IRC with respect to probationary police officers.

23. Other salient differences between the Police Act and the South Australian police legislation considered in *Ferdinands* include the following:

    (a) In the South Australian legislation there was no merits review in the case of a conviction for an offence[28] whereas, contrary to what is implied by the appellant[29], access to the IRC by a confirmed police officer under the provisions of Pt 9 of the Police Act is not excluded if such an officer is

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[23] Ibid at [4] and [5]
[24] Section 179 had provided for the power of dismissal. Section 179 was introduced by the *Police Service (Complaints, Discipline and Appeals) Amendment Act 1993 No 38*; amended by the *Police Legislation Further Amendment Act 1996 No 108*; and substituted with the current s179 without a power of dismissal by the *Police Service Amendment (Complaints and Management Reform) Act 1998 No 123*. Previously s97(1)(a) of the *Police Service Act 1990* provided for regulations relating to dismissal. Contrary to AS [14] s173 has a similar chronology, being inserted in 1993 and only taking its present form, including notice and submissions, in 1998.
[25] *Police Service Amendment Act 1997 No 23*. Assented to 24.6.1997.
[26] CA [168]
[27] Second Reading Speech of the Minister for Police of the Police Service Amendment Bill 1997 (*Hansard*, Legislative Assembly, 18 June 1997, 10563) which was enacted as the *Police Service Amendment Act 1997 No 23*. Assented to 24.6.1997
[28] (2006) 225 CLR 130 at [43]
[29] AS [15]

convicted of an offence under s 201 of the Police Act or any other offence; indeed conviction for an offence does not automatically lead to a loss of confidence, but may be dealt with under s173 of the Police Act: see s 173(4); and

(b) The legislation considered in *Ferdinands* did not state an intention that one statutory regime should apply to the exclusion of the other statutory regime and the problem there arose "only because the legislature did not state an intention"[30]. As submitted below, s 218 of the Police Act states an intention that the IR Act should apply to the exclusion of the Police Act.

10 24. It is submitted that the Court would not be persuaded that the appellant has laid out the requisite very strong grounds necessary to overcome the "general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other"[31].

25. The appellant adopts the reasoning of the Full Bench of the IRC at [31]-[36]. However, while the Full Bench asked the right question at [30], it did not answer this question; at [36] the Full Bench relied on mere inconsistency, without any conclusion or reasoning supporting a conclusion that there is such inconsistency that both statutes cannot stand or live together or cannot be reconciled.

20 Conversely, and contrary to the appellant's submissions[32], Tobias AJA expressly considered, and rejected the appellant's contention that the Commissioner's power to dismiss is incompatible with the rights of a probationary police officer to seek a merits review in the IRC[33].

26. The appellant also relies on the nature of probationary employment to support its case that the Commissioner's decision to dismiss a probationary police officer pursuant to s 80(3) should not be subject to the jurisdiction of the IRC. The appellant calls in aid what was said in *O'Rourke v Miller*[34] about probationary police officers. However that judgment detracts rather than adds to the appellant's

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[30] (2006) 225 CLR 130 at [4] per Gleeson CJ
[31] See Gaudron J in *Saraswati v R* (1991) 172 CLR 1 at 17 cited with approval in *Ferdinands v Commissioner of Public Employment* (2006) 225 CLR 130 at [18] per Gleeson CJ and [48] per Gummow and Hayne JJ and [109] per Kirby J
[32] AS [22]
[33] CA [153] to[156]
[34] (1985) 156 CLR 342

case. First, the judgment distinguished an earlier case that considered the NSW police legislation as depending on statutory provisions which differed materially from those provisions then in force in Victoria[35]. The same can be said of this case as compared with *Ferdinands*. Secondly, it was a case in which, despite the probationary nature of the police officer's employment, the Police Commissioner was held to be subject to statutory provisions that impinged on the Commissioner's power of dismissal.

27. Further, s 88(d) of the IR Act allows the Commission to take into account the nature of the duties of the applicant before dismissal and the likely nature of the duties if the applicant were to be reinstated or re-employed. The IRC can and has taken into account the probationary nature of the employment of a police officer seeking to access the unfair dismissal remedies under the IR Act[36].

28. In any event the legislature has addressed the question of exclusion of probationary police officers from Pt of Ch 2 of the IR Act through the general provision relating to exemption from probationary employment in s 83(2)(b) of the IR Act. By this provision, the legislature left it to the regulations to specify the class of probationary employees to be excluded. The appointment by the appellant of the first respondent and other probationary police officers does not qualify for exemption under the regulations[37]. Moreover, had the legislature been of the view that the application of the general unfair dismissal regime in Pt 6 of Ch 2 of the IR Act would cause substantial problems in its application to probationary police officers because of their particular conditions of employment, or because of the nature of the undertaking in which they are employed, it could have adopted the expedient measure of excluding them by regulation made under s 83(2)(e).

Comparison of Rights of Review

29. The appellant argues that if a probationary police officer is able to engage Pt 6 of Ch 2 of the IR Act, this would place that officer in a position of advantage over a confirmed police officer seeking to engage the provisions of Pt 9 of the Police Act[38]. The Court of Appeal correctly found that, in relation to progressing the merits of a review of a termination, there is little substantive difference between

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[35] Ibid at 350.5
[36] CA [142] to [149]
[37] CA [35] to [41], [82] to [94], [161]
[38] AS [18] to [19]

the matters and procedure in an unfair dismissal application and the matters and procedure in a case conducted under Division 1C of Pt 9 of the Police Act, given the adoption in s 181G of the Police Act of the major provisions of the IR Act applying to unfair dismissal[39].

30. This overall characterisation of the rights of review under Pt 9 compared to the rights of review under Pt 6 of Ch 2 of the IR Act is not undermined by the provisions of Pt 9 relied on by the appellant to demonstrate the supposed inferiority of Pt 9[40]. In relation to those specific provisions the following submissions are made:

(a) Section 181F(1) requires the IRC to consider the reasons for termination and the cases presented by the applicant and the Commissioner. However, s 88 of the IR Act provides that reasons for termination is a matter to be considered by the IRC in a claim brought under Pt 6 of Ch 2 of the IR Act and, in any event, the rules of procedural fairness require that the IRC consider the reasons for termination and the cases presented by the applicant and the Commissioner. While the IRC has held that s181F(1) requires the IRC to consider sequentially the reason for the Commissioner's decision and the cases respectively for the applicant and the Commissioner as to whether the removal was harsh, unjust or unreasonable, the IRC has also held that this variation from the procedure usually adopted in cases heard under Pt 6 of Ch 2 of the IR Act is not of great significance and, in any event, does not alter the test to one different to that applied in such a matter, that is, whether the dismissal was harsh, unjust or unreasonable[41].

(b) Section 181F(2) places the burden of establishing that the removal is harsh, unreasonable or unjust on the applicant. However, there is a similar burden is on the applicant in a case brought under Pt 6 of Ch 2 of the IR Act. While, in cases of dismissal in which the employer relies on misconduct, the IRC has suggested that there is a shifting of the evidentiary burden to demonstrate that fact, this has been in the context that the ultimate burden to make out the claim that the dismissal is harsh,

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[39] CA [76] to [79], [150] to [152]
[40] AS [23]
[41] *Little v Commissioner of Police (No 2)* (2002) 112 IR 212 at 237

unreasonable or unjust still remains on the applicant[42]. The IRC has similarly suggested that, in cases brought under Pt 9 of the Police Act, while s181F(2) places the primary onus on the applicant, this is not inconsistent with the proposition that, once the applicant goes into evidence, there is a shifting of the evidentiary burden to the Commissioner to answer the case presented by the applicant[43].

(c) Section 181F(3)(b) requires that the IRC have regard to 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 of removal. Contrary to the appellant's submissions[44], this matter was addressed by Tobias AJA who said that "it is self-evident that in dealing with an applicant who is a probationary police officer who has been dismissed, the public interest including maintaining the integrity of the NSW Police Force, will loom large"[45]. The importance of integrity for all police officers is well established in the authorities[46]. Moreover, one of the matters to be considered by the IRC in a claim brought under Pt 6 of Ch 2 of the IR Act is the nature of the duties of the applicant before dismissal and after reinstatement and the nature of the duties of any police officer, probationary or otherwise includes, by virtue of s 7(a) of the Police Act, acting in a manner which places integrity above all. Further, if a probationary police officer is dismissed for integrity reasons, by virtue of s 88 of the IR Act those reasons for termination are a matter to be considered in a claim brought under Pt 6 of Ch 2 of the IR Act.

(d) While there is a requirement in s 181F(3)(b) to take into account the Commissioner's order for removal, it is also the case that in the exercise of the IRC's unfair dismissal jurisdiction a consideration of whether a dismissal was harsh, unreasonable or unjust does not involve an appeal from an employer's decision and it does not give to the Commission the power to substitute its decision for that of the employer.[47]

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[42] *Pastrycooks Employees, Biscuit Makers Employees and Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3)* (1990) 35 IR 70 at 83-4
[43] *Bradley George Hosemans v Commissioner of Police* (2004)138 IR 159 at 199
[44] AS [23b]
[45] CA [153]
[46] See, for example, *Police Service Board v Morris* (1984-1985) 156 CLR 397 at 412
[47] *Busways v Johnson* (1994) 55 IR 255 at 261

(e) More generally the IRC is also required by s 146(2) of the IR Act to take into account the public interest in the exercise of its functions. Indeed, the IRC has treated s181F(3) as raising considerations that are similarly broadly relevant in the adjudication of many unfair dismissal applications under the IR Act and particularly so where the proceedings relate to positions in the public sector or other areas where the public interest may have particular relevance[48].

(f) Finally, in relation to s 181F(3), subsection (a) also requires the IRC to have regard to the "interests of the applicant" which is not a matter expressly adverted to in Pt 6 of Ch 2 of the IR Act and is a factor that could be said to give confirmed police officers superior rights of review.

(g) Section 181G(1)(f) provides for notice to be given or leave to be given for the introduction of new evidence. However, this is a procedural rule that does not affect the extent of the merits review possible under Pt 9. The purpose of the provision, as set out in the second reading speech of the Bill which introduced the removal provisions of Pt 9, is to "ensure that the issues are clearly defined and allow both parties to better prepare their case"[49]. This is hardly a platform to impute a legislative intention to treat confirmed police officers differently and disadvantageously, as argued by the appellant[50].

(h) Section 181H provides that the appellant and his advisory panels are compellable witnesses only by leave which requires extraordinary grounds. It is highly unlikely that an applicant in a case under Pt 6 of Ch 2 of the IR Act would seek to compel the Commissioner to be a witness in the applicant's case. It is not surprising that this has never happened. Moreover, s 181H does not prevent the production of documents of the appellant or his advisory panel in relation to the exercise of functions under s 181D[51]

31. The appellant's submissions argue that not all of the above provisions were expressly mentioned by the Court of Appeal. However the Full Bench of the IRC

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[48] *Little v Commissioner of Police (No 2)* (2002), op cit, at 237
[49] Second Reading Speech of the Minister for Police of the Police Service Amendment Bill 1997, op cit
[50] AS [23b]
[51] See *Bradley Eade-Smith v Commissioner of Police* [2009] NSWIRComm 37 at [36]

at [55], relied on by the appellant[52], identifies neither the provisions that are said by the appellant to give probationary police officers superior rights of review, nor the asserted "limitations" imposed by Pt 9 of the Police Act.

32. Perhaps in recognition of the weakness of this argument as to the rights of review of probationary police officers being superior to those of confirmed police officers, the appellant stresses the importance of the special provisions in Pt 9 of the Police Act[53]. However, this is a retreat to the appellant's first argument's reliance on the actual terms of the legislation and a recognition that this is not ameliorated by the argument that there are superior rights of review.

33. The appellant properly draws attention to the proposition that care must be taken in preferring a particular question to avoid an anomaly[54]. However, assuming that there are superior rights of review, the matters identified by the appellant that he says elevate the anomaly to the characterisation of "striking"[55] are unconvincing as follows:

(a) It is irrelevant that a probationary police officer is a position with a long ancestry, as set out in *Kerr v Commissioner of Police and Crown Employees Appeal Board* [1977] 2 NSWLR 721 other than, as shown by that case, that there is a long history of it being recognised that probationary police officers had rights of merits review of the termination of their employment.

(b) The process of confirmation should not be confused with the termination of a probationary police officer. The provisions of the Police Regulation 2008[56] provide for a confirmation process that is separate from the dismissal process. This is by way of contrast with the legislation considered in *O'Rourke v Miller* in which the power to dismiss probationary employees was expressly linked with the failure to appoint as a confirmed police officer. By way of illustration, the order for dismissal issued by the appellant in this case makes no reference to the process of confirmation.

(c) The reference by the appellant to the many provisions in the Police Act that in terms closely regulate the unfair dismissal rights is merely a reference to

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[52] AS [24]
[53] AS [24]
[54] AS [25]
[55] At AS [25]
[56] Clauses 13 and 14

Pt 9 which again appears to be a retreat to the appellant's first argument's reliance on the actual terms of the legislation.

34. The appellant's argument about anomaly, if it exists, is unconvincing in a similar way to the argument that failed in *Saeed v Minister for Immigration and Citizenship*[57]. This is because the existence of some superior rights of review for probationary police officers "is not absurd or unreasonable" and "is far more reasonable than the respondent's construction" which would mean that there are merits rights of review for one class of police officer but "none at all" in relation to another class that has long enjoyed such rights of review[58].

10 ***Section 218 of the Police Act***

35. Section 218 of the Police Act gives the IR Act primacy over the Police Act in the event of what would otherwise be inconsistency unless there is a specific exception in terms.

36. As Gleeson CJ said in *Ferdinands*[59]:

The problem is one of statutory interpretation; a problem that arises only because the legislature did not state an intention either that the two statutory regimes should both apply in such a case, or that the second regime should apply to the exclusion of the first.

37. The problem does not arise in this case because the legislature has in the
20 clearest possible terms, subject to limited exceptions specifically identified in the legislation, stated an intention that the regime under the IR Act should apply to the exclusion of the regime under the Police Act.

38. One area of exception is found in s 218(2) in relation to ss 44 and 89 (which is to be now read as s 88) being provisions that at the time of the enactment of s 218 were in terms specifically exempted from the IR Act.

39. The other area of exception is found in provisions of the Police Act that have been enacted since s 218 was enacted in its present form in December 1996[60], and which in terms specifically affect the IR Act. Such provisions can be found in Pt 9 of the Police Act. The appellant adopts the reasoning of the Full Bench of the IRC

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[57] (2010) 241 CLR 252
[58] Cf Ibid at [84]
[59] At [4]
[60] *Statute Law (Miscellaneous Provisions) Act (No 2) 1996 No 121*. Assented to 3.12.1996

at [61][61] which relied on these provisions of Pt 9 of the Police Act that affect the provisions of the IR Act. However, such provisions prevail over s 218 because they specifically in terms affect the IR Act and because they are later in time than s 218[62].

40. There is no reason why s 218 should be affected by these exceptions other than in their specific and limited application[63]. In particular, given the terms of s 218, there is no reason why s 80(3) which was enacted as part of the original Police Act in 1990[64] should affect the IR Act. The enactment of Pt 9 of the Police Act does not assist the appellant's argument with respect to s218 because the anchor for his argument is s 80(3), either by itself or in combination with Pt 9.

41. The provisions of s 218 are stronger, in terms of giving priority in the event of an inconsistency, than legislation, such as that considered in *Rose v Hvric* (1963) 108 CLR 353, which contains a proviso such as "except where otherwise expressly enacted". Section 218 was enacted without such a proviso which had previously been found in NSW public sector legislation such as that considered by the Court of Appeal at [180]. Both the absence of such a proviso and the ordinary grammatical meaning of the words used by the legislature demonstrate that in the event of any conflict between the Police Act and the IR Act, it was intended that the IR Act would prevail.

42. The appellant dismisses the reliance in the judgment of Handley AJA on s 405(3) of the IR Act[65]. While s 405(3) does not bestow unfair dismissal rights on probationary police officers, it avoids any argument that a decision of the IRC under Pt 6 of Ch 2 is inconsistent with a function under the Police Act with respect to the discipline of a police officer and thus may not be made because of the provisions of s 405(1).

Conclusion

43. For the reasons submitted above, the decision and orders of the Court of Appeal are correct. The appeal should be dismissed.

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[61] AS [26] [38]
[62] Contrary to the suggestion at AS [26] ss 179 and 180 were not enacted in a form that mentioned the IR Act until the *Police Service Amendment (Complaints and Management Reform) Act 1998 No 123*
[63] Cf AS [26]
[64] Then s 73(3) of the *Police Service Act* 1990
[65] AS [36]

Part VIII: Estimate of hours for Respondent's Argument

23. The respondent estimates it will take 1 to 1.5 hours to present the oral argument.

14 September 2012

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POLICE SERVICE ACT 1990 No. 47

NEW SOUTH WALES

TABLE OF PROVISIONS

PART 1 - PRELIMINARY

PART 2 - THE POLICE SERVICE OF NEW SOUTH WALES

PART 3 - THE POLICE BOARD OF NEW SOUTH WALES

POLICE SERVICE ACT 1990 No. 47

NEW SOUTH WALES

Act No. 47, 1990

An Act to establish the Police Service of New South Wales; to provide for the management of the Police Service and for the employment of its members; and for other purposes. [Assented to 26 June 1990]

See also Police and Superannuation Legislation (Amendment) Act 1990.

(a) the Police Board may only recommend a person who has duly applied for appointment to the vacant position; and

(b) the Police Board is to have regard to the advice of the Commissioner; and

(c) the Police Board must, from among the applicants eligible for appointment to the position, recommend the applicant who has, in the opinion of the Police Board, the greatest merit.

(2) The Police Board is required to obtain and have regard to an official report (referred to in section 3 (3)) on the previous employment and conduct of any person recommended for appointment as a non-executive commissioned police officer.

Appointment of inspectors subject to appeal

72. (1) An appointment of a person to a vacant position of a non-executive commissioned police officer of the rank of inspector must not be made unless:

(a) notification of the recommendation of the Police Board has been given to each applicant for the position; and

(b) the time for lodging an appeal under the Police Regulation (Appeals) Act 1923 against the decision of the Police Board to make the recommendation has expired or, if such an appeal has been lodged, the appeal has been withdrawn or determined.

(2) If any such appeal is allowed, the successful appellant is to be regarded as the person recommended for appointment by the Police Board.

(3) A notification under this section may be given personally or by post, or by publication of the notification in any official publication which is circulated to police officers.

Division 4 - Appointment of constables and sergeants

Appointment of constables

73. (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 Police Service at any time and without giving any reason.

Promotion of constables

74. The promotion of police officers within the rank of constable is subject to the regulations and the Police Regulation (Appeals) Act 1923.

Only police officers eligible for appointment as sergeants

75. A vacancy in the position of a police officer of the rank of sergeant may be filled only by a person who is already a police officer of the highest grade of constable or above the rank of constable.

Advertising of vacancies - sergeants

76. If it is proposed to make an appointment under this Part to a vacant position of a police officer of the rank of sergeant, the Commissioner is required to advertise the vacancy (in such manner as the Commissioner thinks fit) among police officers.

Appointment of sergeants to be made on merit

77. (1) In deciding to appoint a person to a vacant position of a police officer of the rank of sergeant:

(a) the Commissioner may only select a person who has duly applied for appointment to the vacant position; and

(b) the Commissioner must, from among the applicants eligible for appointment to the position, select the applicant who has, in the opinion of the Commissioner, the greatest merit.

(2) The Commissioner is required to obtain and have regard to an official report on the previous employment and conduct of any person recommended for appointment as a police officer of the rank of sergeant.

Appointment of sergeants subject to appeal

78. (1) An appointment of a person to a vacant position of a police officer of the rank of sergeant must not be made unless:

(a) notification of the decision of the Commissioner has been given to each applicant for the position; and

Attachment of wages or salary of members of Police Service

96. (1) Schedule 6 to the Public Sector Management Act 1988 applies to members of the Police Service in the same way as it applies to members of the Public Service.

(2) For that purpose, a reference in that Schedule to:

(a) an officer is to be read as a reference to a police or administrative officer; or

(b) a Department Head is to be read as a reference to the Commissioner.

PART 9 - DISCIPLINE OF MEMBERS OF THE POLICE SERVICE

Discipline of police officers

97. (1) The regulations may make provision for or with respect to the discipline ofpolice officers, including:

(a) the imposition by the Commissioner of one or more of the followingpenalties:

(i) the dismissal of a police officer (other than a commissioned police officer);

(ii) the demotion of a police officer (other than a commissioned police officer) to a lower rank or grade;

(iii) the reduction in seniority of a police officer of the rank of constable;

(iv) the suspension from office (with or without pay) of a police officer (other than a commissioned police officer);

(v) the reduction in salary of a police officer (other than a commissioned police officer);

(vi) the imposition of a fine on a police officer;

(vii) the caution or reprimand of a police officer; and

(b) the implementation of the determinations of the Police Tribunal.

(2) The Governor may, with respect to the discipline of commissioned police officers, impose one or more of the following penalties:

(a) the dismissal of a commissioned police officer;

(b) the demotion of a commissioned police officer to a lower rank or grade.

(3) Any fine imposed by the Commissioner under the regulations may be recovered in a court of competent jurisdiction as a debt due to the Crown or from the pay of the police officer in accordance with the regulations.

(4) This section and the regulations under this section are subject to the Police Regulation (Allegations of Misconduct) Act 1978.

Discipline of administrative officers

98. (1) The provisions of Part 5 of the Public Sector Management Act 1988 and the regulations made under that Part (Discipline and conduct of officers of the Public Service) apply to administrative officers in the same way as they apply to officers of the Public Service.

(2) For that purpose:

(a) a reference to the appropriate Department Head is to be read as a reference to the Commissioner; and

(b) a reference to the Public Service is to be read as a reference to the Police Service.

PART 10 - OFFENCES RELATING TO THE POLICE SERVICE

Bribery or corruption

99. (1) A member of the Police Service who receives or solicits any bribe, pecuniary or otherwise, is guilty of an offence.

(2) A person (including a member of the Police Service) who:

(a) gives, or offers or promises to give, any bribe (pecuniary or otherwise) or any other benefit to a member of the Police Service; or

(b) makes any collusive agreement with a member of the Police Service,

for the purpose of inducing the member to neglect his or her duty, of influencing the member in the exercise of his or her functions or of improperly taking advantage of the member's position is guilty of an offence.

is not survived by a spouse) to the personal representative of the police officer.

(3) The Commissioner must not make a payment under this section unless the police officer concerned was, in the opinion of the Commissioner, hurt on duty because the police officer was required to be exposed to risks to which members of the general work force would normally not be required to be exposed in the course of their employment.

(4) The amount of any such payment is to be commensurate, in the opinion of the Commissioner, with the risks to which the police officer concerned was so required to be exposed.

(5) A benefit under this section is payable by the Commissioner and is not payable from the Police Superannuation Fund.

(6) In this section:

"**hurt on duty**", in relation to a police officer, means injured in such circumstances as would entitle the police officer to compensation under the Workers Compensation Act 1987;

"**spouse**" includes de facto partner.

Service of documents on Police Board

116. (1) A document may be served on the Police Board by leaving it at, or by sending it by post to, the office of the Board.

(2) Nothing in subsection (1) affects the operation of any provision of a law or of the rules of a court authorising a document to be served on the Police Board in a manner not provided for by subsection (1).

Industrial Arbitration Act 1940 not affected

117. (1) The Industrial Arbitration Act 1940 is not affected by anything in this Act.

(2) Subsection (1) does not limit section 44 or 89 or any provision of the Industrial Arbitration Act 1940.

Regulations

118. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

POLICE SERVICE (COMPLAINTS, DISCIPLINE AND APPEALS) AMENDMENT ACT 1993 No. 38

NEW SOUTH WALES

TABLE OF PROVISIONS

POLICE SERVICE (COMPLAINTS, DISCIPLINE AND APPEALS) AMENDMENT ACT 1993 No. 38

NEW SOUTH WALES

Act No. 38, 1993

An Act to amend the Police Service Act 1990 with respect to police complaints, discipline and appeals, and in other respects; to repeal the Police Regulation (Allegations of Misconduct) Act 1978 and the Police Regulation (Appeals) Act 1923; and to amend certain other Acts. [Assented to 8 June 1993]

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 RELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

(3) Part 9:

Omit Part 9, insert instead:

PART 9—DISCIPLINE OF MEMBERS OF THE POLICE SERVICE

Division 1—Discipline of police officers

Instigation of disciplinary action by Commissioner

173. (1) If the Commissioner considers that action should be taken against a police officer, the Commissioner may direct the preferment of a departmental charge against the officer or the institution of court proceedings, whichever the Commissioner considers appropriate.

(2) If the Commissioner is satisfied that any conduct of a police officer was not satisfactory but does not justify the preferment of a departmental charge, the Commissioner may admonish the officer for that conduct.

(3) A departmental charge must set out whether the charge relates to conduct the subject of a complaint investigated under Division 4 of Part 8A.

Departmental charges to be heard and determined by Police Tribunal exercising original jurisdiction

174. (1) The Police Tribunal has exclusive jurisdiction to hear a departmental charge that is denied by the police officer and to determine whether it has been proved if:

(a) the charge relates to conduct the subject of a complaint investigated under Division 4 of Part 8A; or

(b) the charge does not relate to such conduct but the police officer elects to have the charge heard by the Police Tribunal.

(2) In exercising the original jurisdiction conferred by this section, the Police Tribunal is to be constituted by a member sitting alone.

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 RELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

Recommendations by Police Tribunal exercising original jurisdiction as to penalty

175. (1) If:

(a) the Police Tribunal, exercising its original jurisdiction, determines that a departmental charge preferred against a police officer has been proved; or

(b) the police officer admits the charge after the Police Tribunal commences to hear the charge,

the Police Tribunal is to make an assessment of the penalty, if any, that the Police Tribunal considers would be appropriate to be imposed on the police officer.

(2) The Police Tribunal is to advise the Minister or the Commissioner, as the case requires, of its recommendation with respect to that penalty.

(3) Before:

(a) the Minister makes a recommendation (if any) to the Governor with respect to the penalty that might be imposed on the police officer against whom the departmental charge was preferred; or

(b) the Commissioner imposes a penalty (if any) on any such police officer,

the Minister or the Commissioner is to take into consideration the recommendation made by the Police Tribunal with respect to that penalty.

Appeal to Review Division of Police Tribunal against decision of Tribunal exercising original jurisdiction

176. (1) If the Police Tribunal exercising its original jurisdiction determines that a departmental charge preferred against a police officer has been proved, the police officer may, within 30 days after the date of the determination, appeal against the determination to the Review Division of the Police Tribunal.

(2) The appeal may be made on any one or more of the following grounds:

(a) that the officer is not guilty of the charge;

(b) that the evidence disclosed no offence;

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 ELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

(c) that the determination is bad and contrary to law;

(d) that the determination is against the evidence and the weight of evidence.

(3) An appeal is to be in the nature of a review of the matter on the evidence given in the relevant proceedings in the Police Tribunal's original jurisdiction.

(4) New evidence may nevertheless be given and considered in the appeal if the Review Division of the Police Tribunal is satisfied that it was not reasonably available at the time the original proceedings were heard.

Proceedings relating to departmental charges

177. (1) At any proceedings before the Police Tribunal relating to a departmental charge, whether in its original jurisdiction or by way of appeal to the Review Division:

(a) the Commissioner and the police officer charged are each entitled to be represented by counsel, solicitor or agent; and

(b) if the charge relates to conduct the subject of a complaint investigated under Division 4 of Part 8A—the complainant is not a party; and

(c) the public is not to be excluded unless the Police Tribunal otherwise orders; and

(d) the function of the Police Tribunal is to determine, on the true merits and justice of the case and without being bound by strict legal precedent, whether or not the charge has been proved.

(2) The Police Tribunal is to cause a copy of its determination at those proceedings to be sent to:

(a) the Commissioner; and

(b) the police officer charged; and

(c) the Ombudsman; and

(d) if the charge relates to conduct the subject of a complaint investigated under Division 4 of Part 8A—the complainant, if the complainant is identified.

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 RELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

When charges duly proved

178. (1) A departmental charge against a police officer is duly proved if

(a) in the case of a charge heard by the Police Tribunal—the Police Tribunal determines that the charge has been proved; or

(b) in any other case—the Commissioner determines that the charge has been proved,

or the charge is admitted by the police officer in accordance with the regulations.

(2) A departmental charge that the Police Tribunal exercising its original jurisdiction determines to be proved is not duly proved:

(a) until the expiry of 30 days after the date of the determination; or

(b) if an appeal to the Review Division of the Police Tribunal is made within that time, until that Review Division determines that the charge is proved or the appeal is duly withdrawn.

(3) A criminal charge against a police officer is duly proved if a court convicts the officer of the offence or finds that the charge has been proved without proceeding to a conviction.

Disciplinary action by Commissioner

179. (1) If a departmental charge or criminal charge against a police officer is duly proved, the Commissioner may take such action against the police officer as the Commissioner considers appropriate.

(2) In particular, the Commissioner may do any one or more of the following:

(a) require the police officer to undergo counselling;

(b) reprimand the police officer;

(c) fine the police officer;

(d) direct that the police officer (if a constable) lose seniority;

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 RELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

(e) reduce the salary of the police officer (if a non-commissioned officer);

(f) demote the police officer (if a non-commissioned officer) to a lower rank or grade, or recommend to the Minister that the police officer (if a commissioned officer) be so demoted;

(g) dismiss the police officer (if a non-commissioned officer) or recommend to the Minister that the police officer (if a commissioned officer) be dismissed.

(3) Any fine imposed by the Commissioner under this section may be recovered in a court of competent jurisdiction as a debt due to the Crown or deducted from the pay of the police officer in accordance with the regulations.

Disciplinary action by Governor

180. (1) The Governor may, with respect to the discipline of commissioned police officers, impose either or both of the following penalties:

(a) demote the police officer to a lower rank or grade;

(b) dismiss the police officer.

(2) This section does not limit any other power of the Governor with respect to commissioned police officers.

(3) Before making a recommendation to the Governor with respect to the penalty to be imposed on a commissioned police officer under this section, the Minister must:

(a) invite the police officer to make a written submission to the Minister (within a reasonable time specified by the Minister) with respect to the penalty which might be imposed by the Governor; and

(b) take into consideration any such submission made by the police officer.

(4) Subsection (3) does not affect any obligation of the Minister under this Act to obtain or take into consideration the recommendation of the Police Tribunal with respect to the penalty.

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 RELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

Regulations relating to discipline

181. (1) The regulations may make provision for or with respect to the discipline of police officers.

(2) In particular, the regulations may make provision for or with respect to:

(a) the reporting by police officers of misconduct of other police officers; and

(b) the preferment of departmental charges against police officers; and

(c) the denial or admission of departmental charges; and

(d) elections for the hearing and determination by the Police Tribunal of departmental charges not relating to conduct the subject of a complaint investigated under Division 4 .of Part 8A; and

(e) proceedings with respect to departmental charges; and

(f) the suspension of police officers from office (with or without pay) pending further investigation and disciplinary action; and

(g) disciplinary action against police officers.

Division 2—Disciplinary appeals by police officers to GREAT

Appeal to GREAT against disciplinary decision of Commissioner

182. (1) A police officer (other than a member of the Police Service Senior Executive Service) may appeal to GREAT against a decision of the Commissioner to punish the police officer:

(a) by the imposition of a fine; or

(b) by a reduction in salary; or

(c) by a demotion to a lower rank or grade; or

(d) by suspension, dismissal, discharge or transfer.

(2) If the decision appealed against was in respect of a charge heard and determined by the Police Tribunal:

(a) the appeal is limited to an appeal against the severity of the punishment imposed; and

SCHEDULE 1—AMENDMENT OF POLICE SERVICE ACT 1990 RELATING TO COMPLAINTS AND DISCIPLINE OF MEMBERS OF POLICE SERVICE—*continued*

(b) GREAT, the Commissioner and the appellant are bound by the findings of the Police Tribunal on the determination of the charge or on appeal to the Review Division of the Police Tribunal.

Application of GREAT Act

183. (1) The Government and Related Employees Appeal Tribunal Act 1980 applies to and in respect of an appeal under this Division in the same way as it applies to an appeal under Division 2 of Part 3 of that Act.

(2) In order to determine the membership of and to constitute GREAT for the purpose of hearing and determining an appeal under this Division, a police officer is taken to be an employee and the Commissioner the employer, within the meaning of the Government and Related Employees Appeal Tribunal Act 1980.

Division 3—Miscellaneous provisions

Discipline of administrative officers

184. (1) The provisions of Part 5 of the Public Sector Management Act 1988 and the regulations made under that Part (Discipline and conduct of officers of the Public Service) apply to administrative officers in the same way as they apply to officers of the Public Service.

(2) For that purpose:

(a) a reference to the appropriate Department Head is to be read as a reference to the Commissioner; and

(b) a reference to the Public Service is to be read as a reference to the Police Service.

Disciplinary appeals to GREAT by non-executive administrative officers

185. The provisions of the Government and Related Employees Appeal Tribunal Act 1980 relating to disciplinary appeals apply to administrative officers (not being members of the Police Service Senior Executive Service) as if those officers were employees, and the Commissioner were their employer, within the meaning of that Act.

SCHEDULE 3—MISCELLANEOUS AND CONSEQUENTIAL AMENDMENTS TO POLICE SERVICE ACT 1990—*continued*

(e) particulars relating to such other matters as are prescribed by the regulations.

(9) Sections 95, 95A:

Omit section 95, insert instead:

Arrangements for use by Police Service of staff of other agencies

95. The Commissioner may arrange for the use of the services of any staff (by way of secondment or Otherwise.)of a government agency (whether or not of New South Wales).

Arrangements for use by other agencies of members of Police Service

95A. (1) The Commissioner may enter into arrangements with a government agency (whether or not of New South Wales) for the use, by such an agency, of the services of members of the Police Service (by way of secondment or otherwise).

(2) While performing services for any such agency, a police officer retains rank, seniority and remuneration as a police officer and may continue to act as a constable. However, this subsection does not prevent the payment of additional remuneration to police officers in accordance with arrangements under this section.

(10) Sections 99–20 **(Renumbering):**

Renumber sections 99 to 120 as sections 200 to 221.

(11) Section 102, renumbered as section 203 **(Wearing or possession of police uniform by others):**

(a) Section 102 (1):

Omit "who wears the uniform, or a reasonable imitation of the uniform, of a police officer", insert instead "who wears, or has in possession, a police uniform".

(b) Section 102 (2):

Omit the subsection, insert instead:

(2) A person is not guilty of an offence against this section if the person establishes that:

(a) the person had the permission of the Commissioner to wear or possess the police uniform; or

New South Wales

Police Legislation Further Amendment Act 1996 No 108

Contents

New South Wales

Police Legislation Further Amendment Act 1996 No 108

Act No 108, 1996

An Act to amend the *Police Service Act 1990* with respect to the employment of police officers, to abolish the Police Board and to provide for the removal from the Police Service of police officers in whom the Commissioner of Police does not have confidence; and for other purposes. [Assented to 2 December 1996]

(6) A member of the Police Service may be required to satisfy the Minister or Commissioner, as the case requires, that any assets or income in which the member has an interest, which are used by the member or which are available for the member's use, have been lawfully acquired or gained.

(7) The Commissioner may furnish the Police Integrity Commission with any financial statement or integrity statement furnished under this section and any other information that has come to the Commissioner's attention under this section.

(8) In this section:

financial statement means a statement of

(a) assets and liabilities, or

(b) income and expenditure,

or both.

integrity statement means a statement to the effect that the person by whom the statement is made has not engaged in any criminal activity or corrupt conduct during the period to which the statement relates.

[55] Section 122 Other definitions

Insert at the end of the section:

(2) A report by the Police Integrity Commission of the kind referred to in section 24 (7), 39 (4), 64 (5) or 71 (3) is not a complaint for the purposes of this Part merely because it contains matter that brings a police officer's conduct or integrity into question.

[56] Section 179 Disciplinary action by Commissioner

Omit section 179 (2) (e), (f) and (g). Insert instead:

(e) reduce the salary of the police officer,

(f) demote the police officer to a lower rank or grade,

(g) dismiss the police officer.

[57] Section 180 Disciplinary action by Governor

Omit the section.

[58] Section 181B Dismissal of police officers—information arising out of Police Royal Commission

Omit the section.

[59] Section 181C Acceptance of resignation of police officers in certain cases

Omit "(or in the case of an executive officer within the meaning of section 32, the Police Board)".

[60] Part 9, Division 1B

Insert after Division 1A:

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 Police Service 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 Police Service.

(5) The removal takes effect when the order is made.

(6) The Supreme Court has jurisdiction to review a decision or order of the Commissioner to remove a police officer under this section. Any such review is to be conducted in accordance with the administrative law principles applicable to the review of decisions that turn on the opinion of a decision-maker.

(7) Except as provided by subsection (6):

(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.

(8) For the purposes of this Act, removal of a police officer from the Police Service 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 Police Service.

(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.

New South Wales

Statute Law (Miscellaneous Provisions) Act (No 2) 1996 No 121

Contents

Contents

New South Wales

Statute Law (Miscellaneous Provisions) Act (No 2) 1996 No 121

Act No 121, 1996

An Act to repeal certain Acts and to amend certain other Acts and regulations in various respects and for the purpose of effecting statute law revision; and to make certain savings. [Assented to 3 December 1996]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Statute Law (Miscellaneous Provisions) Act (No 2) 1996*.

2 Commencement

(1) This Act commences on the date of assent, except as provided by subsections (2)–(5).

(2) The amendments made by Schedule 1 commence on the dates specified in that Schedule in relation to the amendments concerned. If a commencement date is not specified, the amendments commence on the date of assent.

(3) The amendments made by Schedule 3 commence on the date that is 3 months after the date of assent, or on such earlier day or days as may be appointed by proclamation.

(4) The amendments made by Schedule 4 commence on the date that is 4 months after the date of assent, or on such earlier day or days as may be appointed by proclamation. However, the amendments to the *Industrial Relations Act 1996* made by Schedule 4 commence on the date of assent.

(5) The repeals effected by Schedule 6 commence on the date of assent. However, the repeal of the *Prickly Pear Act 1987* by Schedule 6 commences on 1 January 1997.

3 Amendments

Each Act and regulation specified in Schedules 1–5 is amended as set out in those Schedules.

4 Repeals

Each Act specified in Schedule 6 is repealed.

5 General savings, transitional and other provisions

Schedule 7 has effect.

6 Explanatory notes

The matter appearing under the heading "Explanatory note" in any of the Schedules does not form part of this Act.

4.39 Police Department (Transit Police) Act 1989 No 58

[1] Section 20 Conditions of employment

Omit section 20 (5).

[2] Section 31 Eligibility for appointment to Public Service

Omit *"Industrial Arbitration Act 1940"* from section 31 (2).
Insert instead *"Industrial Relations Act 1996"*.

[3] Section 33 Attachment of remuneration

Omit section 33 (5). Insert instead:

(5) The amount which, by virtue of subsection (4), is to be ascertained in accordance with this subsection must be ascertained by deducting $8 from the basic wage in force under clause 15 of Schedule 4 to the *Industrial Relations Act 1996* before the deduction under subsection (3) is made.

4.40 Police Service Act 1990 No 47

[1] Sections 44 (2), 87 (2), 89 (1) and 218

Omit *"Industrial Relations Act 1991"* wherever occurring.
Insert instead *"Industrial Relations Act 1996"*.

[2] Section 86 Commissioner may enter into agreements

Omit "section 349 of the *Industrial Relations Act 1991"* from section 86 (2).
Insert instead "section 405 of the *Industrial Relations Act 1996"*.

[3] Section 181B Dismissal of police officers—information arising out of Police Royal Commission

Omit *"(Industrial Relations Act 1991* not affected)" from section 181B (5).
Insert instead *"(Industrial Relations Act 1996* not affected)".

[4] Section 181B (5)

Omit "Part 8 (Unfair Dismissals) of Chapter 3 of the *Industrial Relations Act 1991"*.
Insert instead "Part 6 (Unfair dismissals) of Chapter 2 of the *Industrial Relations Act 1996"*.

[5] Section 189 President of Police Tribunal and Deputy President

Omit section 189 (4) (b). Insert instead:

(b) a judicial member of the Industrial Relations Commission nominated by the President of that Commission, or

[6] Section 489 (8)

Omit "Chief Judge of the Industrial Court".
Insert instead "President of the Industrial Relations Commission".

4.41 Public Sector Executives Superannuation Act 1989 No 106

Section 68 Appeals against FTC's determinations in disputes

Omit "Industrial Commission" wherever occurring.
Insert instead "Industrial Relations Commission in Court Session".

Police Service Amendment Bill

About this item
Speakers Whelan Mr Paul
Business Bill, Second Reading

POLICE SERVICE AMENDMENT BILL

Suspension of standing orders agreed to.

Bill introduced and read a first time.

Second Reading

Mr WHELAN (Ashfield - Minister for Police) [4.02 p.m.]: I move:

That this bill be now read a second time.

Page 10562

On 15 May the Premier tabled three volumes of the final report of the Royal Commission into the New South Wales Police Service. Three years ago Justice Wood was given the task of uncovering the extent and causes of corruption in the New South Wales Police Service. It is a matter of public record and shame that the royal commission was able to reveal in such graphic detail the level and extent of corruption within the Police Service. However, with the problem now recognised and acknowledged, the time has come to move into the recovery and rebuilding stage.

The legislation before the House arises from the royal commission's final report. It deals with a single issue, that is, the industrial rights flowing from the termination of employment of police officers under the provisions commonly referred to as commissioner's confidence. If a single issue had to be isolated as crucial to reform of the Police Service it would have to be the ability of the commissioner to divest the service of those who fail to meet it standards. Without the means to quickly and efficiently terminate the employment of individuals who cannot or will not comply with minimum standards of integrity, conduct and competence, it is doubtful that we will ever reap the full benefits of the reform process.

The old system clearly did not work. It was cumbersome, protracted and legalistic. It effectively meant that the corrupt and the hopeless could seek sanctuary and remain within the Police Service. The system required the proving of departmental charges before the Police Tribunal. After the tribunal had made a recommendation, action was taken on the basis of its findings. The action was then subject to appeal to the Government and Related Employees Appeal Tribunal, GREAT, which routinely put dismissed officers back into the service. The system could be manipulated and beaten. Corrupt officers knew that, and took comfort from it

Basically, the system sheltered those who least deserved it, and failed the people of New South Wales, who looked to the Police Service to be a model of honesty, integrity and community service. In November 1996 this Parliament threw out the old system. Responding to the Immediate Measures Interim Report of the Royal Commission, section 181D was introduced into the Police Service Act. For the first time the Commissioner of Police was given a fast and effective way to rid the service of those who had forfeited the right to be police officers in this State. Of course, section 181B had previously allowed the removal of officers suspected of criminal or corrupt behaviour, but only in the limited circumstances of information arising from the royal commission.

Section 181D extended Commissioner Ryan's power to ensure he is not only the most powerful police commissioner in the history of this State but also in Australia. The Carr Government is determined to ensure that Commissioner Ryan's Police Service contains only officers in whom he has confidence. That is why the current bill only affects the processes after the police officer has been removed from the Police Service. Commissioner Ryan's power to remove corrupt and inept officers remains unaffected. After the introduction of section 181D, the Premier and I, after consultation with caucus, agreed the post-dismissal process - the appeal rights, if you like - should be revisited after the final report of the royal commission was delivered.

The provisions which came into effect on 16 December 1996 were, as I said at the time, exceptional, designed to deal with an exceptional situation. The appeal rights were, to put it simply, that the exercise of the commissioner's power to dismiss was subject to a limited review by the Supreme Court on administrative law or judicial review principles. In its final report the royal commission explored in some depth various proposals in relation to the appeal processes arising after an exercise of the commissioner's confidence powers. The options examined had many points of similarity, the key issues on which they varied were the nature of the review provisions and the restrictions on how the parties could run their cases.

Honourable members may recall that, earlier this year, the royal commission convened a roundtable conference to consider the question of police appeals and disciplinary processes. The successful outcome of the conference prompted my establishment of a working party to consider the finer detail of the matters discussed at that conference. The working party comprised representatives of the Police Service, the Ministry for Police, the Ombudsman's office, and the police associations. The report prepared for me by the working party was one of the options considered by the royal commission in the final report. In considering three options, the royal commission outlined a range of matters which it considered were appropriate for the new system.

Some of those matters were common to different options, whilst others were not. Since the final reports were delivered, I have examined the various options in great detail. The bill does not
Page 10563
conform exactly with any of the three options the royal commission considered. Rather it takes the best aspects of options two and three to strike a balance between the spirit of the royal commission recommendations and existing industrial law and practice in New South Wales. The result is a process that retains the commissioner's power to ensure that the service is able to quickly free itself of those who fail to live up to professional standards of integrity, competence and behaviour, but also protects against injustice

It is that simple - the bill is anti-corruption but also anti-injustice. The bill accommodates the unique nature of policing, overcomes the problems of past appeal processes, and puts the police officer on a similar footing to other employees under the Industrial Relations Act. It is the first step in the long-term overhaul of the police disciplinary system. The other matters, such as the abolition of the Police Tribunal and the removal of GREAT from the remaining disciplinary processes, will be addressed during the next stage of reform.

The bill provides police officers with the right to go to the Industrial Relations Commission to seek review of a dismissal decision. Again, whilst similar to the protection provided to other workers under the unfair dismissal provisions of the Industrial Relations Act, it is not identical as there are some important differences which I will discuss shortly. The key aspect review to be conducted by the Industrial Relations Commission will be a review of the merits of the decision of the commissioner. It will allow both the fairness of the process by which the decision was arrived at, the facts on which the decision was based, and whether dismissal was harsh, unjust or unreasonable.

However, it will be for the applicant to establish that a decision was harsh, unjust or unreasonable. These words will be familiar to those with knowledge of our industrial relations law as they are the same grounds on which an employee may seek redress under the unfair dismissal provisions of part 6 of chapter 2 of the Industrial Relations Act 1996. In making its decisions the IRC will be required to balance the interests of the applicant against the wider public interest, including the interest of protecting the integrity of the Police Service. This will also include the fact that the applicant was dismissed under section 181D(1), that is, for want of commissioner's confidence. These are significant tests.

For the sake of clarity I should stress that the lodging of an application for review will not stay the commissioner's decision. What that means in practice is that the applicant becomes a former police officer from the time the commissioner signs the order to dismiss him or her. This is an enormous change from the past, when officers not only abused the system to get back into the service but also made it virtually impossible to get them out in the first place. It is in the interests of the applicant, the community and the Police Service that any reviews arising out of dismissals be finalised quickly. That is why the bill provides that an application for review must be lodged within 14 days, and requires that the hearing be commenced within four weeks. Hearings under division 1C of the Police Service Act will be conducted by the IRC in a similar way to hearings under part 6 of chapter 2 of the Industrial Relations Act.

The bill also requires that if either party wishes to introduce new evidence to support its case, notice must be given. That means notice not only of intention must be given, but also notice of the substance of the evidence that is sought to be adduced. This will ensure that the issues are clearly defined and allow both parties to better prepare their case. If notice is not given, leave of the IRC can be sought. This provision of the bill is not intended in any way to reduce the discretion of the IRC to grant leave upon any basis it considers appropriate.

In the interests of fairness and justice, however, the IRC will be required to grant leave if satisfied of the following: 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; 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; and where the commission is satisfied that the new evidence might materially have affected the commissioner's decision.

Other issues addressed by the bill include the admissibility of transcripts of evidence arising out of the royal commission or the Police Integrity Commission, to which the commissioner may have had regard in coming to a decision. The bill clearly states that, subject to section 163(1) of the Industrial Relations Act, nothing in the bill is intended to override the existing law in this area. If a transcript from any proceedings has been considered by the commissioner in reaching a decision to terminate then it is likely to be relevant. In the normal course of events under section 181D, even before making a determination the commissioner is required to advise an officer of the grounds considered to warrant loss
Page 10564
of confidence. If an order is subsequently made it must also detail the reasons that have caused the commissioner to lose confidence in the officer and issue the removal notice.

Under the review process, the commissioner will also be required to provide the applicant with a copy of the documents and other material taken into account in determining that a termination order should be issued. The reasons put forward by the commission as supporting the termination decision will also be the first thing considered by the IRC in hearing the review application. Some concern had been expressed that as the decision maker, the Commissioner of Police would be routinely required to attend the IRC to give evidence in every review hearing. Whilst this is not currently the experience in matters before the Industrial Relations Commission, it was considered an issue of sufficient weight to warrant legislative guidance.

The bill therefore makes it clear that the leave of the IRC is required before the commissioner or a member of any advisory committee can be called as a witness before the IRC. Before giving such leave the IRC must be satisfied that extraordinary grounds exist that warrant evidence being personally given. I have now explained in some detail the provisions of this bill, and it will be obvious to all that the legislative framework will clarify the position in respect of challenging a decision to terminate employment under section 181D. Access to a right of review on the merits is important. However, it is equally important that the process followed in reaching a determination under section 181D is sound and does not itself give rise to appeals.

Section 181D contains certain key requirements such as advising officers of the case against them and providing an opportunity to respond. Commissioner Ryan has supplemented this with an administrative protocol which describes the procedures that will be followed in reaching a determination under section 181D. This protocol was developed in consultation with the police unions and endeavours to ensure the process is fair, open and accountable. Of note is the fact that under the protocol an officer has the opportunity to make a submission to a panel which includes a member of the community to provide advice to the commissioner.

I wish to advise the House that I intend to take the matter one step further and make a regulation which sets out in detail the steps to be followed in the exercise of the commissioner's confidence power. This will ensure that the process is both open and known. This in turn will contribute to fair exercise of the power and further reduce potential for appeals. Of course, my intention is to again bring together the relevant parties in formulating this regulation, to ensure that the resulting process is the best and fairest possible.

In the course of drafting this bill I have consulted with the royal commission, the Commissioner of Police, the Police Integrity Commission Commissioner and the Police Association. There is one matter, requested by the Police Association, which the Government is simply unable to accommodate. The association requested that the appeal rights under the bill be made retrospective. The Government is unable to accede to this request for the simple reason that, as I said in November, the previous appeal was designed to institute an interim process which would always be superseded after the final report was delivered. There is no going back and the Government will not be persuaded otherwise.

Finally, in the next session of Parliament I look forward to introducing a new Police Service Act which will both lay the legislative framework for implementation of many of the changes recommended by the royal commission and symbolise the emergence of the new Police Service. That legislation will be historic and no doubt eagerly awaited by all in this Chamber. It will be wide ranging, touching on all facets of the Police Service from recruitment and terms of employment to methods of promotion and the management of misconduct within the Police Service. I commend the bill to the House.

Debate adjourned on motion by Mr Tink.

New South Wales

Police Service Amendment Act 1997 No 23

Contents

New South Wales

Police Service Amendment Act 1997 No 23

Act No 23, 1997

An Act to amend the *Police Service Act 1990* so as to enable the Industrial Relations Commission to review the removal of police officers from the Police Service by the Commissioner of Police; and for other purposes. [Assented to 24 June 1997]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Police Service Amendment Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Police Service Act 1990 No 47

The *Police Service Act 1990* is amended as set out in Schedule 1.

4 Amendment of Police Integrity Commission Act 1996 No 28

The *Police Integrity Commission Act 1996* is amended as set out in Schedule 2.

Schedule 1 Amendment of Police Service Act 1990

(Section 3)

[1] Section 181D Commissioner may remove police officers

Omit section 181D (6).

[2] Section 181D (7)

Omit "subsection (6)". Insert instead "Division 1C".

[3] Section 181D (7A) and (7B)

Insert after section 181D (7):

(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.

[4] Part 9, Divisions 1C and 1D

Insert after Division 1B:

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

181E Review generally

(1) A police officer who is removed from the Police Service 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 Police Service,

(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 Police Service 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 Police Service, 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.

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

181K Constitution of Commission for the purposes of this Part

(1) A review under this Part 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 this Part is to be conducted before a Full Bench of the Commission constituted by 3 judicial members.

(3) Proceedings on a review under this Part, or on an appeal from the decision of the Commission on a review under this Part, are taken not to be proceedings of the Commission in Court Session.

[5] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Police Service Amendment Act 1997

[6] Schedule 4, Part 12

Insert after Part 11:

Part 12 Provisions consequent on enactment of Police Service Amendment Act 1997

40 Definitions

In this Part:

amended Act means this Act, as amended by the amending Act.

amending Act means the *Police Service Amendment Act 1997*.

41 Application of amendments to existing orders under section 181D

An amendment made by Schedule 1 to the amending Act does not apply to any order made under section 181D before the commencement of that amendment.

42 Continuation of certain proceedings

Any proceedings before the Supreme Court:

(a) that were commenced before the commencement of Schedule 1 [4] to the amending Act in connection with a decision or order made under section 181D, or

New South Wales

Police Service Amendment (Complaints and Management Reform) Act 1998 No 123

Contents

New South Wales

Police Service Amendment (Complaints and Management Reform) Act 1998 No 123

Act No 123, 1998

An Act to amend the *Police Service Act 1990* so as to make provision with respect to the handling of complaints about police officers and the management of police officers' misconduct and unsatisfactory performance and so as to abolish the Police Tribunal; to make consequential amendments to certain other Acts: and for other purposes. [Assented to 26 November 1998]

(2) For the purpose only of assisting in the conduct of an investigation under this Part, a member of a Police Force who is seconded or otherwise engaged as referred to in subsection (1):

(a) has and may exercise all of the functions (including all of the powers, immunities, liabilities and responsibilities) that a police officer of the rank of constable has and may exercise under any law of the State (including the common law and this Act), and

(b) in particular:

(i) is exempt from the requirement of the *Firearms Act 1996* to be authorised by a licence or permit to possess or use semi-automatic pistols (or to possess ammunition for any such pistol), and

(ii) for the purposes of section 6 of the *Prohibited Weapons Act 1989*, is authorised to possess handcuffs and body armour vests.

[4] Part 9, heading

Omit the heading. Insert instead:

Part 9 Management of conduct within the Police Service

[5] Part 9, Divisions 1 and 1A

Omit the Divisions. Insert instead:

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 Police Service who is senior to the police officer in respect of whom those functions are being exercised.

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.

[6] Section 181K Constitution of Commission for the purposes of Division 1C

Omit "this Part" wherever occurring.
Insert instead "Division 1C".

[7] Part 9, Division 2

Omit the Division. Insert instead:

Division 2 Resignation of police officers on recommendation of Police Integrity Commission

182 Acceptance of resignation of police officers in certain cases

(1) The Commissioner is required to accept the resignation of a police officer from the Police Service if:

(a) the officer tenders his or her resignation, and

(b) the Police Integrity Commission has recommended that the officer be allowed to resign.

(2) This section prevails to the extent of any inconsistency with any other provision of this Act.

[8] Part 9A The Police Tribunal of New South Wales

Omit the Part.

[9] Section 219 Regulations

Insert after section 219 (2) (i):

(j) the reporting by police officers of misconduct or unsatisfactory performance of other police officers,

(k) the suspension of police officers from office (with or without pay) pending investigation of alleged misconduct or unsatisfactory performance or pending action under Division 1 of Part 9 with respect to misconduct or unsatisfactory performance.

[10] Schedule 1

Insert before Schedule 2:

Schedule 1 Non-reviewable action

(Section 173)

coaching

mentoring

training and development

increased professional, administrative or educational supervision

counselling

reprimand

warning

retaining

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

[11] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Police Service Amendment (Complaints and Management Reform) Act 1998

[12] Schedule 4, Part 13

Insert after Part 12 of Schedule 4:

Part 13 Provisions consequent on enactment of Police Service Amendment (Complaints and Management Reform) Act 1998

44 Definitions

In this Part:

amending Act means the *Police Service Amendment (Complaints and Management Reform) Act 1998.*

45 Abolition of Police Tribunal

(1) This clause commences on the commencement of Schedule 1 [8] to the amending Act.

(2) The Police Tribunal is abolished.