HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

JEFFREY THOMAS JARRATT APPLICANT

AND

COMMISSIONER OF POLICE
FOR NEW SOUTH WALES & ANOR RESPONDENTS

Jarratt v Commissioner of Police for New South Wales [2005] HCA 50
8 September 2005
S593/2003

ORDER

1. *Special leave to appeal granted and the appeal be treated as instituted and heard instanter.*

2. *Appeal allowed with costs.*

3. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 11 November 2003 and in their place order that the appeal to that Court is dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

M L D Einfeld QC with D R Campbell SC and R D Glasson for the applicant (instructed by Verekers)

R C Kenzie QC with P Ginters for the respondents (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Jarratt v Commissioner of Police for New South Wales

Police – Tenure – Dismissal from office – Applicant was Deputy Commissioner of Police and a member of the senior executive service under Part 5 of the *Police Act* 1990 (NSW) ("the Act") – Commissioner of Police recommended to Governor that the applicant be dismissed from office pursuant to the Act – Governor dismissed applicant – Applicant afforded no hearing – Whether dismissal from office invalid as breaching requirements of natural justice.

Constitutional law – Prerogatives of the Crown – Prerogative to dismiss Crown servants at pleasure – Whether implied term of contract of employment of Crown servant – Whether compatible with modern-day conditions of public service – Whether compatible with statutory regime for employment of senior police officers – Whether compatible with obligation to accord natural justice.

Statutes – Construction – Provision for Governor to dismiss senior police officer "at any time" on advice of Commissioner of Police – Whether the words "at any time" import into the statute the Crown's right to dismiss Crown servants at pleasure – Whether obligation to accord natural justice implicitly excluded.

Contract – Damages – Where employment contract entered into pursuant to statutory provision following appointment to office – Where dismissal from office necessarily resulted in termination of contract – Whether award of damages may be made for repudiation resulting from invalid exercise of statutory power – Relevance of statutory scheme for compensation for dismissal from office.

Words and phrases – "at any time", "dismissal at pleasure".

Police Act 1990 (NSW), ss 8, 11, 33-35, 39, 40, 41, 42, 43, 51, 53, 181D.

1 GLEESON CJ. This application for special leave to appeal was referred to a Full Court and argued as on an appeal. The issues concern the application of the requirements of natural justice to the removal of Mr Jarratt ("the applicant") from the office of Deputy Commissioner, Field Operations and Development, within the Police Service of New South Wales, and the consequences of a failure to comply with those requirements.

2 The applicant was appointed (in fact, re-appointed) to the office of Deputy Commissioner on 5 February 2000 for a term of five years. He was removed on 12 September 2001, with effect from 14 October 2001. The removal was by the Governor of New South Wales, acting under s 51 of the *Police Service Act* 1990 (NSW)[1] ("the Act") upon a recommendation of the Commissioner (pursuant to s 51(1)(a)) submitted with the approval of the Minister for Police (pursuant to s 51(1A)). The removal was said in a media release from the Commissioner to be on the ground of "performance", by which was obviously meant non-performance. The applicant complained that he was given no opportunity to be heard on the substance of any criticisms of his performance before a recommendation was made that he be removed. Whatever room there might have been for factual argument about that matter, no such argument was advanced on behalf of the respondents in these proceedings. Rather, their case was simply that the applicant was not entitled to such an opportunity.

3 The facts, and the history of the litigation, are set out in the reasons of McHugh, Gummow and Hayne JJ. At first instance in the Supreme Court of New South Wales, Simpson J[2] held that there had been a denial of natural justice to the applicant, that his purported removal was invalid, that his discharge from the Police Service constituted a repudiation of his contract of employment, and that (after allowing for compensation that had already been paid to him) he was entitled to damages in the sum of $642,936.35. The Court of Appeal reversed the decision of Simpson J, holding that the applicant had not been entitled to a hearing by the Commissioner before recommending removal, and that his removal was valid and effective[3].

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1 This Act is now known as the *Police Act* 1990 (NSW), see *Police Service Amendment (NSW Police) Act* 2002 (NSW), Sched 1(3).

2 *Jarratt v Commissioner of Police for NSW* (2002) 56 NSWLR 72.

3 *Commissioner of Police (NSW) v Jarratt* (2003) 59 NSWLR 87.

Police officers

4 The authors of *Halsbury's Laws of England*[4] describe the history of the police force as the history of the office of constable, upon which an organised police force was later superimposed. In former times in the United Kingdom, constables, or officers under other titles, were responsible for keeping the peace. In *Enever v The King*[5], Griffith CJ said:

> "At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by Statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular Statute. Again, at common law constables had large powers necessarily incident to the discharge of their functions as peace officers or conservators of the peace, amongst which perhaps the most important was the authority to arrest on suspicion of felony."

5 The individual authority and responsibility of constables gave rise to particular legal consequences, such as the absence at common law of vicarious responsibility on the part of the body or authority appointing the constable[6]. The Supreme Court of Canada described the office as one of "certain offices that survive because their historical roots are still nourished by functional consideration[s]"[7].

Crown service "at pleasure"

6 At common law, subject to the provisions of any statute or to the terms of any valid contract, and, in Australia, subject also to the Constitution, people in the service of the Crown held their offices during the pleasure of the Crown. This was an implied term of their appointment or engagement[8]. This Court held

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4 4th ed (Reissue), vol 36(1) at [201]-[204].

5 (1906) 3 CLR 969 at 975-976.

6 *Enever v The King* (1906) 3 CLR 969.

7 *Wells v Newfoundland* [1999] 3 SCR 199 at 213.

8 *Shenton v Smith* [1895] AC 229 at 234-235; *Fletcher v Nott* (1938) 60 CLR 55 at 64.

in *Fletcher v Nott*[9] that the rule applied to members of the police force of New South Wales. Dixon J said[10]: "The general rule of the common law is that the King may refuse the services of any officer of the Crown and suspend or dismiss him from his office".

7 It is no longer appropriate to account for the rule in terms redolent of monarchical patronage[11]. The rule has a distinct rationale in its application to the armed services, but in its application to the public service generally it is difficult to reconcile with modern conceptions of government employment and accountability. Perhaps it could be justified, if justification be sought, by reference to the need of the executive government to retain the overall capacity to alter the size and structure of the public service, or to respond to political exigencies, without contractual inhibition[12]. Yet most ordinary contracts of employment cannot be made the subject of an order for specific performance, and, at common law, a wrongful dismissal is ordinarily effective to bring the employment relationship to an end, even if the employee does not accept the repudiation of the employment contract, and even though there may be a liability to pay damages to the employee[13].

8 To say that an office is held at pleasure means that whoever has the power to remove the office-holder may exercise that power at any time, and without having to provide, either to the office-holder, or to a court examining the decision to remove, any justification of the decision[14]. No period of notice, and no justification or cause for removal, is required by law[15]. No fault or incapacity of the office-holder, or other compelling circumstance, need be shown. The corollary has generally been taken to be that such an officer has no right to be heard before removal. In *Ridge v Baldwin*[16], Lord Reid gave as the explanation

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9 (1938) 60 CLR 55.

10 (1938) 60 CLR 55 at 77.

11 *Wells v Newfoundland* [1999] 3 SCR 199 at 212.

12 See the differing points of view expressed in *Suttling v Director-General of Education* (1985) 3 NSWLR 427.

13 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427-428 per Brennan CJ, Dawson and Toohey JJ.

14 *Ridge v Baldwin* [1964] AC 40 at 65-66 per Lord Reid.

15 *Coutts v The Commonwealth* (1985) 157 CLR 91.

16 [1964] AC 40 at 66.

that, if the person with power to remove is not bound to give a reason to the office-holder, then there is nothing for the office-holder to argue about, and if a court cannot require the person to give a reason to the court, then there is no way in which the court can determine whether it would be fair to hear the officer's case before taking action. That explanation may call for further examination. Lord Reid also pointed out that, as a practical matter, when an office-holder is removed, a reason will commonly be given. The facts of the present case illustrate why that is so. The removal of a Deputy Commissioner of Police is a public event. The applicant was not removed without explanation. The public were told that the applicant's performance was unsatisfactory. This was bound to have an adverse effect on the applicant's reputation. In its nature, it is a charge that a person might wish to answer. Any answer the applicant gave would almost certainly have gone before the Minister, and the Governor, and would probably have become public. The Governor-in-Council would act on the Minister's advice, but, in the circumstances of a case such as the present, it would be wrong to assume that there could be no purpose in giving the office-holder an opportunity to be heard. Furthermore, in *Malloch v Aberdeen Corporation*[17], Lord Wilberforce pointed out that the rigour of the "at pleasure" rule may make it all the more important, in some circumstances, for a person whose career, or pension rights, may be affected, to have an opportunity to state his or her case. His Lordship went on to say that, while courts will respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not prevent them from examining the statutory framework and the context to determine whether there is a right to be heard.

9 Logic does not dictate that it is the necessary corollary of a power to remove an office-holder without assigning a reason that the office-holder should be denied the possibility of being heard. Of course, to conclude that the requirements of natural justice must be complied with leaves open the question of the practical content of those requirements in a given case. It is possible to imagine circumstances in which the public interest might demand peremptory removal of a senior police officer, or in which such an officer might have nothing that could possibly be said in his or her defence. In argument in *Ridge v Baldwin*[18] (a case about a chief constable of police who was denied natural justice) some colourful examples were given: a chief constable who assaults the chairman of a watch committee; or a chief constable who is seen "drunk in the gutter". Such, however, is not the present case.

10 The common law rule concerning service at pleasure was established long before modern developments in the law relating to natural justice, and the

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17 [1971] 1 WLR 1578 at 1597; [1971] 2 All ER 1278 at 1295-1296.

18 [1964] AC 40 at 57.

approach to statutory interpretation dictated by those developments[19]. It was also established at a time when public service was less likely to be subject to statutory and contractual regulation than at present. We are here concerned, not with the pristine common law principle, but with a statutory scheme of office-holding and employment. The Act provided the framework and context of the applicant's appointment, and determined the nature and extent of his rights. The Act is not a code. It does not exclude the common law. It is, however, one thing to say that the common law explains some features of the Act. It is a different thing to say that the Act embodies, or gives statutory effect to, common law principles without modification. Without doubt, an understanding of the common law is important for an appreciation of the statutory scheme. Nevertheless, the Act made substantial alterations to the common law.

The Police Service Act

11 It is convenient to refer to the Act in its form at the time relevant to the applicant's case.

12 The Act is described in its long title as an Act to establish the Police Service of New South Wales, and to provide for the management of the Service and for the employment of its members. The Police Service comprises the Commissioner, members of the Police Service Senior Executive Service ("PSSES"), all other police and administrative officers employed under the Act, and temporary employees (s 5). The ranks of police officers within the service are: Commissioner; Member of the PSSES; Superintendent; Inspector; Sergeant; and Constable (s 12). The applicant fell within the second of those ranks.

13 Subject to the direction of the Minister, the Commissioner is responsible for the management and control of the Service. His or her responsibility includes the effective, efficient and economical management of the Service (s 8). The Minister's capacity to direct the Commissioner imports the possibility of political control, and carries with it political accountability. The Minister's responsibility is to Parliament. One of the Commissioner's powers is to create, classify and grade positions within the Service (s 10).

14 Part 4 of the Act deals with the Commissioner, who is to be appointed by the Governor on the recommendation of the Minister (s 24). Subject to the Act, the Commissioner holds office for such period, not exceeding five years, as is specified in the instrument of appointment. The term is renewable (s 26). The employment of the Commissioner is governed by a contract of employment between the Commissioner and the Minister, and a number of the later provisions

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19 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Annetts v McCann* (1990) 170 CLR 596.

relating to executive officers also apply to the Commissioner (s 27). The Governor may remove the Commissioner from office on the recommendation of the Minister. Such a recommendation may be made only after the Minister has given the Police Integrity Commission a reasonable opportunity to comment on the proposed recommendation (s 28). Section 28 provides the exclusive basis for removal of the Commissioner (s 28(8)). It provides two substantial modifications of what would have been the position at common law. First, while the Commissioner's contract of employment is with the Minister, it is the Governor, acting on the recommendation of the Minister, who has the power of removal. This means, of course, the Governor-in-Council. Secondly, the Minister's power to make a recommendation is fettered by the need to notify the Police Integrity Commission of what is proposed and to give that Commission an opportunity to comment. The removal of a Commissioner of Police would almost certainly be accompanied by wide publicity. That practical consideration, coupled with the need to inform the Police Integrity Commission, and bring the matter before the Governor, seems to make it likely that, in most cases, a reason for a removal recommendation would exist and be made public. There is nothing in the Act that says that the Commissioner may be removed only for breach of contract or incapacity. Even so, the procedure that must be followed makes it practically certain that the Minister would seek to justify the recommendation for removal. The provisions of the Act which deal with the Commissioner are not directly relevant, but they form part of the statutory context. It would be odd if the requirements of natural justice were to apply to the removal of a Commissioner but not to the removal of a Deputy Commissioner.

15 Part 5, which deals with the PSSES, applied to the applicant. The PSSES comprises the persons holding the positions referred to in Sched 2 of the Act. The list of positions in the Schedule begins with "Deputy Commissioner (2 positions)". It was to one of those positions that the applicant was appointed. Appointments to vacant PSSES positions are to be made by the Governor on the recommendation of the Commissioner in the case of appointments to the position of Deputy Commissioner or Assistant Commissioner, and by the Commissioner in other cases (s 36). Appointments are to be on merit (s 39).

16 Division 4 of Pt 5 deals with the terms of employment of PSSES officers. An officer holds office for such period not exceeding five years as is specified in the officer's instrument of appointment. The terms are renewable (s 40). There is to be a contract of employment with each officer, which is to be between the officer and the Commissioner, and which governs the officer's employment (s 41). Section 41 makes two significant provisions about such contract. First, the Commissioner, in such contract, "acts for and on behalf of the Crown" (s 41(6)). Secondly, the contract does not effect the officer's appointment, nor is the officer's term of office fixed by the contract of employment (s 41(3)). The instrument of appointment specifies a period, not exceeding five years, during which the officer is to hold office (s 40). That specification is subject to the Act; it is not, however, subject to the officer's contract. The contract deals with such

matters as the officer's duties, and the officer's remuneration (s 42). In respect of those matters, the contract is a source of both rights and obligations[20]. There is to be an annual review by the Commissioner of an officer's performance (s 43).

17 Division 6 of Pt 5 deals with the removal and retirement of PSSES officers. The position of an officer becomes vacant if the officer is removed from office under the Act (s 49). Section 51 provides that a PSSES officer may be removed from office at any time by the Governor on the recommendation of the Commissioner in the case of a Deputy Commissioner or Assistant Commissioner, or by the Commissioner in any other case. Such a recommendation requires the approval of the Minister. Provision is made for a PSSES officer who is removed or otherwise leaves office to return to the public sector in certain circumstances. Section 53 provides for compensation to be paid to a PSSES officer who has no right to return to the public sector. The section applies to a PSSES officer who is removed from office under s 51, or who is otherwise removed from office (except for misbehaviour after due inquiry). The reference to "otherwise removed" would pick up s 181D, which is not presently relevant, and which empowers the Commissioner, by order in writing, and subject to certain conditions, to remove a police officer from the Police Service if the Commissioner does not have confidence in the police officer's suitability. Section 53(4) provides that the maximum compensation payable is an amount equal to 38 weeks' remuneration. Section 53(5) provides that a person to whom the section applies is not entitled to any other compensation for the removal from office or to any remuneration in respect of the office for any period afterwards. Following his removal, the applicant sought and obtained compensation under s 53. Nevertheless, in these proceedings the applicant's primary contention is that he was not validly removed under s 51, and it was not argued that his earlier claim for compensation under s 53 prevents him from raising that argument. This is a matter to which it will be necessary to return.

18 Part 6 deals with non-executive officers, including commissioned officers, sergeants and constables. Commissioned officers are appointed for renewable five year terms (ss 72A, 72B). It is of marginal interest that a decision by the Commissioner not to renew such an officer's appointment can only be made on the ground of inability to meet required standards, and that provision may be made for review of such a decision (s 72C).

19 For present purposes, the key provisions of the Act are ss 40, 41 and 51, read in the wider context of the Act as a whole.

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20 See also s 46.

Sections 40, 41 and 51

20 Section 41 establishes and defines the relationship between the statutory and the contractual aspects of the position of an officer such as the Deputy Commissioner. The employment of the officer is "governed by" a contract of employment between the officer and the Commissioner, such contract being made by the Commissioner for and on behalf of the Crown, that is, the Crown in right of the State of New South Wales. Although the contract governs the employment, and (pursuant to s 42) deals with such matters as the officer's duties and remuneration, it does not amount to an instrument of appointment, and it does not fix the officer's term of office (s 41(3)). Section 40 provides that, subject to the Act, an executive officer holds office for such period (not exceeding five years) as is specified in the officer's instrument of appointment. In the present case, the applicant was, by his instrument of appointment, to hold office for five years. That was reflected in his contract of appointment, but was not itself a term of the contract. He held office by virtue of the Act and the appointment made under the Act, and his term of office, by virtue of s 40, was five years, subject to the Act, which, for present purposes, means subject to s 51.

21 Section 51 relevantly provides that a Deputy Commissioner may be removed from office at any time by the Governor, on the recommendation of the Commissioner submitted with the approval of the Minister. That this provision reflects, and gives partial effect to, the common law principle discussed above is not in doubt. The words "at any time" mean that, if the requirements of the statute are observed, no period of notice of termination is required. The officer's contract assumes valid appointment to, and continued holding of, office, but appointment and removal occur by force of the Act, not the contract.

22 The power of removal given by s 51 is not qualified by reference to grounds for removal. In that respect, s 51 may be contrasted with s 181D. The grant of a power to remove a Deputy Commissioner from office at any time is, therefore, significant, not only in what is said, but also in what is not said. The validity of the removal does not depend upon the existence of any particular cause for removal, except to the extent that the statutory power must be exercised in good faith and for the purpose for which it is given. It does, however, depend upon compliance with certain procedures, involving recommendation by the Commissioner, approval by the Minister, and a decision of the Governor-in-Council. As has already been pointed out, those procedures, and the context in which they operate (removal of a Deputy Commissioner of Police before the expiry of his or her term of office), mean that it is practically certain that some cause for removal will be considered to exist, and highly likely that such cause will be made public, as happened in the present case. The issue is whether, in that statutory context, there is a legal requirement on the part of the Commissioner (the practical content of which may vary with the circumstances of particular cases) to give the Deputy Commissioner an opportunity to be heard before a recommendation goes to the Governor-in-Council. That problem is

essentially one of statutory construction. The precise question to be asked is whether the exercise of the power of removal conferred by s 51 of the Act is conditioned upon the observance of the rules of natural justice[21].

Natural justice

23 The form of natural justice to which the applicant says he was entitled was an opportunity to be heard by the Commissioner on the question whether he should be removed from office. His assertion that he was not given any such opportunity has not been contested in the proceedings. In consequence, it is unnecessary to examine what such an opportunity might have entailed in the circumstances. It was announced to the public that the applicant was removed because of his failure to adequately perform his duties. Because of the basis on which the applicant's claim was defended, there was no occasion for the primary judge to make any finding as to what sort of case the applicant might have been able to make out had he been given the opportunity to answer that complaint.

24 Section 51 of the Act confers upon public officials (the Governor, acting on the recommendation of the Commissioner submitted with the consent of the Minister) a power to remove the applicant from public office, and thereby prejudice the applicant's rights and interests. In *Annetts v McCann*[22] it was said that it can now be "taken as settled" that the rules of natural justice regulate the exercise of such a power "unless they are excluded by plain words of necessary intendment".

25 There are no plain words of necessary intendment, in s 51 of the Act or elsewhere, that indicate that the power of removal conferred by s 51 may be exercised without giving a Deputy Commissioner a fair opportunity to be heard. What is involved is not removal in the exercise of monarchical prerogative. What is involved is a statutory power which requires certain procedures to be followed. It is conceivable that there may be cases of a valid exercise of the power for reasons, or on the basis of considerations, that are of such a nature that there would be nothing on which a Deputy Commissioner could realistically have anything to say. It is clear, however, that the power may also be exercised for reasons about which a Deputy Commissioner could have a good deal to say. The very breadth of the statutory power seems to me to be an argument for, rather than against, a conclusion that it was intended to be exercised fairly. So also is the consideration that, in practice, the power would normally be exercised for cause, even though such cause is not legally necessary.

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21 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 68-69 [29].

22 (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

26 Far from relying on plain words of necessary intendment to exclude the requirements of fairness in the exercise of the power conferred by s 51 of the Act, the respondents are driven to rely on an implication, founded upon the words "may be removed from office at any time", read in the context of the common law principle as to service of the Crown at pleasure. We are not here concerned with the monarch's "prerogative" power to dispense with the services of a subject at pleasure. We are concerned with a statutory scheme for the management of the Police Service and for the employment of its members, likely to have been intended to embody modern conceptions of public accountability. Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice[23].

27 In the Court of Appeal, Mason P considered that s 53, and in particular sub-ss (4) and (5), supported the conclusion that s 51 embodied the "at pleasure" principle, and excluded the requirements of natural justice. Those provisions in effect impose a cap on the entitlement to compensation of a person who is validly removed from office. Suppose that there was a purported removal under s 51 involving a failure to comply with the procedural requirements of that section because, for example, the Minister's approval to the Commissioner's recommendation was not obtained. The provisions of s 53 would not apply to such a case. They do not throw light upon the question of what is required for valid removal.

28 Simpson J was right to conclude that the power conferred by s 51 is conditioned upon observance of the requirements of natural justice and that, since there was no attempt to argue that those requirements were observed in the present case, the applicant's removal from office was invalid.

Relief

29 Questions of relief in the present case are affected by three considerations: the nature of the statutory scheme, involving aspects of both office-holding and contract; the conduct of the parties following the invalid removal; and the manner in which the case was argued before the primary judge.

30 Like the chief constable in *Ridge v Baldwin*[24], the applicant did not seek to be reinstated as Deputy Commissioner. He did not challenge the validity of the

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23 cf *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1105 [20]; 208 ALR 124 at 130.

24 See [1964] AC 40 at 81.

appointment of his successor. The Act provides for only two Deputy Commissioners. The other position was at all material times filled. The applicant did not claim that the successor to his position was not entitled to be regarded as the new Deputy Commissioner. He did not continue to perform, or attempt to perform, the duties of a Deputy Commissioner. It has been noted above that, in the case of an ordinary contract of employment, a wrongful dismissal usually terminates the employment relationship, because an ordinary contract of employment is not specifically enforceable; the services of the employee cannot normally be forced upon an unwilling employer. The applicant, far from claiming that he was still Deputy Commissioner, promptly made a claim for compensation under s 53, and compensation (in the maximum sum) was assessed.

31 In the proceedings before Simpson J, in which the applicant sought and obtained declarations that his removal was invalid and that the termination of his contract was wrongful, the applicant's claim for compensation under s 53 was treated as having been made without prejudice to his contention that his removal was invalid. Simpson J recorded that no argument was advanced that, by making an application under s 53, the applicant forfeited his right to challenge his removal. Having regard to the identity of the respondents, whose concern in the litigation has been with the larger question of legal principle, this is not surprising. Mason P thought that it would have been strongly arguable that the applicant could not approbate and reprobate but, the point not having been taken, expressed no concluded view. He agreed with Simpson J that s 53 applies only in the case of a valid removal.

32 Having resolved the issues of statutory construction in favour of the applicant, Simpson J assessed damages for wrongful removal from office and termination of employment in an orthodox fashion.

Conclusion

33 Special leave to appeal should be granted. The appeal should be treated as heard instanter and allowed with costs. The orders of the Court of Appeal should be set aside, and in place of those orders it should be ordered that the appeal to that Court be dismissed with costs.

34 McHUGH, GUMMOW AND HAYNE JJ. On 5 February 2000, Mr J T Jarratt, whom we shall call the applicant, was appointed Deputy Commissioner within the Police Service of New South Wales ("the Police Service"). He was removed from that position on 12 September 2001. This litigation arises from that removal and the circumstances attending it.

35 The applicant's application for special leave was adjourned for argument before the Full Court as if on an appeal. Special leave should be granted and the appeal allowed. To explain why that result should follow it is convenient to begin with some consideration of the applicable legislation governing the Police Service.

The position of Deputy Commissioner

36 The *Police Act* 1990 (NSW) ("the Act") repealed various statutes, the first of which was the *Police Regulation Act* 1899 (NSW) ("the 1899 Act"). Further reference to the 1899 Act will be made later in these reasons.

37 The Police Service was established by s 4 of the Act and s 5 specified its composition as including the Commissioner and members of the Police Service Senior Executive Service ("the Senior Executive Service").

38 Part 4 of the Act (ss 24-31) provided further for the office of Commissioner. The responsibility of the Commissioner included "the effective, efficient and economical management of the functions and activities of the Police Service" (s 8(2)). Part 5 of the Act (ss 32-61) made provision for the Senior Executive Service and for two positions of Deputy Commissioner.

39 The appointment of the applicant in 2000 was made by the Governor with the advice of the Executive Council[25] and on the recommendation of the Commissioner (Mr Ryan) and with the approval of the Minister for Police. These steps were required by s 36 of the Act.

40 The appointment of the applicant was for a term of five years, from 5 February 2000 to 4 February 2005. That was the maximum term permitted by s 40 of the Act, with an eligibility, if otherwise qualified, for re-appointment.

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25 A reference in the Act to the Governor is a reference to the Governor with the advice of the Executive Council: s 14 of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act").

41 The applicant had joined the Police Service in 1967 as a Probationary Constable and had held various ranks. He had first been appointed as a Deputy Commissioner in 1997 for a three year period.

42 It is important for consideration of the issues which arise on this appeal to note immediately that the position of Deputy Commissioner was created by statute, and that the procedures for the making of the appointment by the Governor in Council were specified by statute. This also, as will appear, was true of the power of removal from that position. Thus, the present case differs from those military and civil appointments which, in the United Kingdom, have been made by or in the name of the sovereign without supporting legislation and, as it is said, under the prerogative. It will be necessary to return to this distinction.

43 Section 41 of the Act stipulated that the applicant's employment as a Deputy Commissioner was to be governed by a contract of employment between him and the Commissioner, in which capacity the Commissioner acted "for and on behalf of the Crown" (s 41(6)). The reference to "the Crown" is to "the Crown in right of New South Wales"[26] and, it would appear, to the body politic identified as the State of New South Wales[27]. The contract was not to exclude any provision of the Act or the Regulations thereunder (s 41(5)) and was not to provide for the applicant's appointment or term of office (s 41(3)). However, the contract might be made before or (as in this case) after the appointment (s 41(2)).

44 The applicant's contract was in writing bearing the date 28 April 2000 ("the Contract"). Clause 4 gave as the title of the applicant's position "Deputy Commissioner, Field Operations and Development". Clauses 15-17 provided for his remuneration.

45 The confluence between the Act and the Contract rendered apt the identification in *McVicar v Commissioner for Railways (NSW)*[28] of an engagement of employment on terms partly statutory and partly contractual.

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26 Interpretation Act, s 13(b).

27 *Sue v Hill* (1999) 199 CLR 462 at 498 [84].

28 (1951) 83 CLR 521 at 528.

The litigation

46 In a proceeding instituted by the applicant in the Supreme Court of New South Wales against the Commissioner and the State of New South Wales[29], Simpson J gave judgment on 5 July 2002. Her Honour made declarations to the effect that removal from office and consequent termination of the Contract were invalid, and entered judgment against both defendants in the sum of $642,936.35[30]. In quantifying that sum, her Honour allowed for a sum received by the applicant and which had been determined as compensation by the Statutory and Other Offices Remuneration Tribunal ("the Remuneration Tribunal") under s 53 of the Act. It may be observed that the damages were awarded at a time when, but for the events that had happened, the applicant would have had several years of his term still to complete.

47 An appeal by the defendants to the Court of Appeal (Mason P, Meagher and Santow JJA) succeeded[31] and in this Court the applicant seeks reinstatement of the orders of Simpson J.

The removal of the applicant

48 More must now be said of the legislative basis for the removal of the applicant from his position as a Deputy Commissioner. The applicant was removed by steps taken in reliance upon s 51 of the Act. That section was stated (by s 51(7)) not to prevent removal from office by other means; these include s 181D. This latter provision empowered the Commissioner, by order in writing, to remove a police officer from the Police Service where the Commissioner lacks confidence in that officer but set out a procedure requiring the giving of notice to the officer with the opportunity to make written submissions to the Commissioner.

49 Section 51, on the other hand, vested the power of removal from office in the Governor in Council and conditioned the exercise of that power upon, in the applicant's case, the recommendation of the Commissioner. The giving of the

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29 Section 5(1) of the *Crown Proceedings Act* 1988 (NSW) identified this as the proper title in a civil proceeding against the Crown in right of the State. The State was added as a party during the hearing.

30 *Jarratt v Commissioner of Police for New South Wales* (2002) 56 NSWLR 72.

31 *Commissioner of Police (NSW) v Jarratt* (2003) 59 NSWLR 87.

recommendation required the approval of the Minister. As they stood at the relevant time, sub-ss (1) and (1A) of s 51 stated[32]:

> "(1) An executive officer may be removed from office at any time:
>
> (a) by the Governor on the recommendation of the Commissioner, in the case of a Deputy Commissioner or Assistant Commissioner, or
>
> (b) by the Commissioner, in any other case.
>
> (1A) A recommendation referred to in subsection (1)(a) may not be submitted to the Governor except with the approval of the Minister."

50 By stipulating for the recommendation of the Commissioner, s 51 is to be considered as conferring upon the Commissioner the power to make the recommendation, conditioned upon the Minister's approval[33]. That power was not expressly limited by the statement of the criteria for its exercise but, in accordance with the general principles explained in *Klein v Domus Pty Ltd*[34], two considerations applied. First, regard was had to the scope and purpose of the provision as guiding the formation of a view as to the justice of the case. Here, the responsibility of the Commissioner included the effective, efficient and economical management of the functions and activities of the Police Service (s 8(2)). Secondly, a particular exercise of the power which was actuated and dominated by a reason outside the scope of the purpose of the power would be vitiated.

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32 As enacted in 1990, s 51(1) provided for removal on the recommendation of the Police Board. The Board was abolished and s 51 amended by the *Police Legislation Further Amendment Act* 1996 (NSW). After the delivery by Simpson J of her reasons on 5 July 2002, s 51(1) was amended by the *Public Sector Employment and Management Act* 2002 (NSW), Sched 7.6, Item [3], by adding after "at any time" the words "for any or no reason and without notice". It is agreed that, for this appeal, the Act is to be considered in its form before that change: see s 30 of the Interpretation Act.

33 See *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 171-172 [16].

34 (1963) 109 CLR 467 at 473.

Procedural fairness

51 However, it is not upon the above limitations which the applicant founds his case. The applicant fixes upon the statement made, with ample citation of modern authority, by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[35] to the effect that, unless excluded by plain words of necessary intendment, the conferral of power upon a public official such as the Commissioner to prejudice the rights of the applicant was attended by the rules of natural justice. No doubt the content of the hearing rule may vary from case to case[36]. In argument, situations of extreme urgency were postulated where neither the giving of notice to a Deputy Commissioner nor the opportunity for submissions would be appropriate. But that was not this case.

52 On the evening of 5 September 2001, the applicant received at his house a copy of a press release issued on that day at 6.10 pm. This stated that the Commissioner had recommended the termination of the contract of the applicant "on the grounds of performance". The Governor in Council acted on 12 September. In the meantime, on 10 September, the applicant received a copy of a document signed by the Commissioner and stated to have been prepared in order to assist the consideration of a compensation determination by the Remuneration Tribunal. The evidence of the applicant, which was not tested in cross-examination, was that none of the matters respecting the adequacy of his performance described by the Commissioner in that document had been raised with him, nor had he been given any opportunity to make comments, observations or submissions on those matters. The Commissioner did not give evidence.

53 In these circumstances, Simpson J concluded that the requirement of procedural fairness had entailed at the least that, when the Commissioner was contemplating a recommendation of removal of the applicant, the applicant should have been notified of the proposal, advised of any specific allegations against him and the content of any adverse report, and given an opportunity to respond to those allegations and any criticisms of his performance as a Deputy Commissioner. Subject to the other arguments on which the respondents resisted the appeal, there was no real dispute that, unless there had been no obligation whatever to afford procedural fairness, Simpson J had been correct.

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35 (1990) 170 CLR 596 at 598.

36 See, for example, *Barratt v Howard* (2000) 96 FCR 428 at 451-452.

54 Simpson J made a declaration that, by reason of the failure of the Commissioner to accord the applicant procedural fairness in making the recommendation for his removal from office, the decisions to remove him and to terminate the Contract were invalid. The invalidity of the removal from office purportedly under s 51(1) would follow because the exercise of that power by the Governor in Council was posited by s 51(1) upon a valid exercise of the anterior power of recommendation by the Commissioner.

55 This appeal thus may be disposed of without consideration of what, if any, duty to observe procedural fairness to the applicant attended the deliberations of the Governor in Council[37].

Wrongful dismissal

56 The applicant, not having been removed under s 51(1), did not cease to be an executive officer. This result otherwise would have followed from the operation of s 51(4). The effect of s 51(4) is that, where an executive officer is removed under s 51(1) and not declared by the Commissioner to be an unattached officer in the Police Service, the officer ceases to be an executive officer, unless appointed to another executive position.

57 But the absence of a removal effective in law, of itself, said nothing as to the continued operation of the Contract whereunder the applicant was remunerated. However, the press release of 5 September 2001 spoke of the termination of the applicant's contract and the Commissioner's Chief of Staff, when writing to the Remuneration Tribunal on 7 September 2001, spoke of the termination of the applicant's employment, the inference being that this was because he was no longer capable of acting thereunder because of the removal from office. That amounted to a repudiation of the Contract.

58 Upon the footing that the purported removal of the applicant from his statutory office was invalid, the authorities in this Court[38] indicate that the refusal to allow the applicant to perform his duties for the balance of his term and receive his remuneration was without justification and amounted to, or was

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37 cf *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

38 *Williamson v The Commonwealth* (1907) 5 CLR 174; *Lucy v The Commonwealth* (1923) 33 CLR 229; *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521.

"analogous to"[39], wrongful dismissal. The reasoning in the authorities appears sufficiently from the statement of Starke J in *Lucy v The Commonwealth*[40]:

> "The relation between the Crown and its officers is contractual in its nature. Service under the Crown involves, in the case of civil officers, a contract of service – peculiar in its conditions, no doubt, and in many cases subject to statutory provisions and qualifications – but still a contract[41]. And, if this be so, there is no difficulty in applying the general law in relation to servants who are wrongfully discharged from their service. A servant so treated can bring an action against his master for breaking his contract of service by discharging him. The measure of damages in such an action is not the wages agreed upon[42], but the actual loss sustained, including, of course, compensation for any wages of which the servant was deprived by reason of his dismissal[43]."

59 This reasoning indicates why, in the present case, the award of damages by Simpson J did not cut across the principle that, where there has been a denial of procedural fairness in the exercise of statutory or prerogative powers, the law does not recognise a cause of action for damages and confines the complainant to public law remedies[44].

60 In assessing damages in a case such as the present and by analogy to an action for wrongful dismissal, it may well be urged that account has to be taken that at some time in the balance of his term the applicant may have been liable for removal under procedures which did meet the requirements of the Act. However, statements of Rich J and of Starke and Dixon JJ in *Geddes v Magrath*[45]

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39 *Geddes v Magrath* (1933) 50 CLR 520 at 534.

40 (1923) 33 CLR 229 at 253; cf *Director-General of Education v Suttling* (1987) 162 CLR 427 at 437-438.

41 *Gould v Stuart* [1896] AC 575 at 577.

42 See *Emmens v Elderton* (1853) 4 HLC 624 [10 ER 606]; *Cutter v Powell* (1795) 6 TR 320 [101 ER 573].

43 *Goodman v Pocock* (1850) 15 QB 576 [117 ER 577].

44 See the remarks of Deane J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 45.

45 (1933) 50 CLR 520 at 530-531, 533-535.

appear to suggest the contrary and that the presence of a power of removal would be disregarded in assessing damages against the respondents.

The respondents' case

61 As indicated by their Notice of Appeal to the Court of Appeal, the respondents' case at trial was that, because the applicant had held a position "at pleasure", there could be no case for denial of procedural fairness by the Commissioner and no award of damages by reason of the wrongful deprivation of office. Nor did the respondents contend that the acceptance by the applicant of the compensation payment awarded by the Remuneration Tribunal represented his election between remedies or otherwise barred his claim to damages.

62 The respondents took their stand at trial on the basis that there had been an entitlement to dismiss at pleasure and they were not to be drawn into questions of justification and damages. Any deficiency in the evidence which now may be seen as adversely affecting the respondents' interests in those matters falls at their feet. In this Court, the respondents do not contend the contrary.

63 The Court of Appeal held that (i) the "dismissal at pleasure principle" applied; (ii) it was not displaced by the scheme of the Act and (iii) the peremptory dismissal of the applicant did not involve any invalid or unlawful act. The respondents support and the applicant challenges these holdings. It is convenient now to consider the "dismissal at pleasure principle", and then to return to the terms of the Act.

Dismissal at pleasure

64 The common law principles respecting the nature and incidents of a public office evolved before the development in the nineteenth century, both in the United Kingdom and in those colonies with representative and responsible government, of a modern system of public administration. To that new structure some of the common law principles were readily adapted; others such as that supporting dismissal at pleasure were less so[46].

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46 Selway, *The Constitution of South Australia*, (1997) at 155.

65 In *Marks v The Commonwealth*[47], Windeyer J, in the course of a judgment much informed by a knowledge of English constitutional history, remarked[48]:

> "Servants of the Crown, civil and military, are by the common law employed only during the pleasure of the Crown. Except when modified by statute, that rule has an overriding place in all engagements to serve the Crown. All offices under the Crown are so held at common law, except some ancient offices of inheritance and certain offices created by patent with a tenure for life or during good behaviour, as in the case of judges of the superior courts. ... Its consequence is that the Crown may dismiss its servants at will, without notice at any time."

66 Writing in England in 1820, Chitty had given as an instance of a high situation held only during the King's pleasure the ancient office of Lord Chancellor, and remarked[49]:

> "Offices may be granted at will, of which there are many instances; and it is a general common law rule, upon which, however, various exceptions have been engrafted by statute, that the King may terminate at pleasure the authority of officers employed by his Majesty."

67 The significance of the references in these passages to the operation of statute is a matter to which it will be necessary to return after making the following observations.

68 First, the general common law rule of which Chitty spoke developed at a time and in a political system very different from that obtaining in Australia. Some of the offices spoken of above carried the right to exact fees, retained by the office-holder; others (including until 1870 military commissions[50]) were items of property which might be bought and sold. In *Marks v The Commonwealth*[51], Windeyer J remarked:

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47 (1964) 111 CLR 549.

48 (1964) 111 CLR 549 at 586. See, further, *Coutts v The Commonwealth* (1985) 157 CLR 91 at 99, 120.

49 Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820), ch 7, sec 1 at 82 (footnote omitted).

50 *Marks v The Commonwealth* (1964) 111 CLR 549 at 568-569.

51 (1964) 111 CLR 549 at 568.

> "The notion of an office as a form of property in which a man can have an estate is foreign to present-day ideas. But it is, I think, the key to an understanding of the legal meanings of resigning an office and of holding an office at pleasure."

69 Secondly, the proposition that an office-holder under the Crown might be dismissed in any case at will and without cause previously was supported in the United Kingdom by the view, since discredited there[52], that the manner of exercise of non-statutory powers of the executive government was never susceptible of judicial review. In Australia, as Windeyer J explained in *Marks*[53], the constitutional structure after federation rendered inapplicable any such general proposition.

70 Thirdly, the ancient office of constable or peace officer was one with peculiar characteristics. Appointment was made in various ways, including by election; thereafter, the power of appointment (and removal) was vested by statute in specified authorities, such as municipal bodies[54]. The Chief Constable of Brighton, the appellant in *Ridge v Baldwin*[55] was placed in that position by operation of the *Municipal Corporations Act* 1882 (UK)[56]. Further, whilst, as Griffith CJ put it in *Enever v The King*[57], the holder of an office of constable or peace officer was regarded by the common law "as being, in some sense, a servant of the Crown", the responsibility for unjustifiable acts of such an officer did not extend to the appointor to the office. Nor was an action *per quod servitium amisit* available to the Crown against a third party. In *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)*[58], the Privy Council held that no action *per quod* lay for the loss of services of a police officer appointed in New South Wales under the 1899 Act.

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52 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *M v Home Office* [1994] 1 AC 377.

53 (1964) 111 CLR 549 at 564-565.

54 See *Enever v The King* (1906) 3 CLR 969 at 975.

55 [1964] AC 40.

56 [1964] AC 40 at 64.

57 (1906) 3 CLR 969 at 975.

58 (1955) 92 CLR 113; [1955] AC 457.

71 Fourthly, the rationale for the "at pleasure principle", namely, as Lord Diplock put it[59]:

> "the theory that those by whom the administration of the realm is carried on do so as personal servants of the monarch who can dismiss them at will, because the King can do no wrong"

cannot now, if it ever did, adequately support that "principle" in a contemporary setting of public administration. Nor can the theory that the executive government should not be hampered by contract "in matters which concern the welfare of the State"[60]. Hence the well-based criticisms by McHugh JA in *Suttling v Director-General of Education*[61].

72 Finally, the retention of the prerogative as the source of obligation for those in military and civil service persisted in the United Kingdom well after statute had taken the field in Australia. With respect to the army, this was still true of the United Kingdom at the time *Marks* was decided in this Court[62]. It appears that for the most part the regulations which govern the Civil Service in the United Kingdom still have no statutory basis and are made under the prerogative[63]. The public service of the Australian colonies, then of the Commonwealth and the States, developed quite differently.

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59 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409.

60 *Fletcher v Nott* (1938) 60 CLR 55 at 67. See, however, as to the contractual fettering of statutory discretions, *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 74-76; Rose, "The Government and Contract", in Finn (ed), *Essays on Contract*, (1987) 233 at 242-244.

61 (1985) 3 NSWLR 427 at 444-447. See also the statements by the Supreme Court of Canada in *Wells v Newfoundland* [1999] 3 SCR 199 at 215-219.

62 (1964) 111 CLR 549 at 564-565. See now *Halsbury's Laws of England*, 4th ed Reissue, vol 8(2), §§883-885.

63 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 397; *Halsbury's Laws of England*, 4th ed Reissue, vol 8(2), §549.

73 Professor Finn has described the processes whereby the public service in the colonies was marked off from its British counterpart so that in Australia, as confirmed by the Privy Council in *Gould v Stuart*[64], the position was that[65]:

> "the Crown–public servant relationship was a contractual one; that the relevant Act and its regulations prescribed the conditions on which the contract was to be made; and that the contract and thus the Act founding it, were enforceable in the courts".

The remarks of Starke J in *Lucy v The Commonwealth*[66] set out earlier in these reasons display that understanding of the position in this country.

74 In New South Wales, s 37 of the *Constitution Act* 1855 (Imp) vested in the Governor in Council "the appointment to all public offices under the Government of the colony hereafter to become vacant or to be created"[67]. Thereafter, the *Civil Service Act* 1884 (NSW) was said by Owen J in *Josephson v Young*[68] to have been passed "to provide a complete code for the service". The provision corresponding to s 37, namely s 47 of the *Constitution Act* 1902 (NSW) ("the Constitution Act"), is not entrenched and frequently has been impliedly amended by subsequent legislation, so that the reference therein to the appointment by the Governor in Council of "all public offices under the Government" has been said to be obsolete[69].

75 What then remains for the operation in New South Wales today of a principle adopted from the United Kingdom in colonial times that no action lies for wrongful dismissal occasioned by the refusal to retain in office a person holding that office at the pleasure of the Crown, the exercise of that pleasure necessarily not being wrongful?

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64 [1896] AC 575.

65 Finn, *Law and Government in Colonial Australia*, (1987) at 66.

66 (1923) 33 CLR 229 at 253.

67 Certain "minor appointments" were excepted; the appointment of Ministers was "vested in the Governor alone".

68 (1900) 21 NSWR 188 at 196. See also *Gould v Stewart* [1896] AC 575.

69 Twomey, *The Constitution of New South Wales*, (2004) at 713.

76 In making their case for the persistence of such a principle and its application to the present case, the respondents draw attention to various considerations. First, particular statutes may provide for the bringing about of a relationship between the Crown in right of New South Wales and an appointee to a statutory office which is a contract of employment between them[70]. The statement in s 41(6) of the Act that, in any contract of employment between the officer and the Commissioner, the latter acts for and on behalf of the Crown is said to provide an immediately relevant example.

77 Secondly, the respondents emphasise that it was said by Griffith CJ in *Ryder v Foley*[71], a case concerning dismissal under the *Police Act* 1863 (Q), that[72]:

> "it is an implied term in the engagement of every person in the Public Service, that he holds office during pleasure, unless the contrary appears by Statute".

That proposition was adopted by Latham CJ in *Fletcher v Nott*[73], with respect to the 1899 Act. In *Ryder v Foley*, O'Connor J had said that any contract was[74]:

> "entirely unilateral – a contract enabling the Government to put an end to it at any time they might think fit".

That statement was approved, with reference to the situation under the *Police Regulation Act* 1955 (Tas), in the joint judgment in *Kaye v Attorney-General for Tasmania*[75].

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70 See, generally, the observations of Mahoney JA in *Holly v Director of Public Works* (1988) 14 NSWLR 140 at 146-148. Mahoney JA there said (at 147) that "'employment' is a term long applied to a position in the Public Service". Speaking of statutory officers in South Australia such as the Auditor-General, the Electoral Commissioners and the Director of Public Prosecutions, Justice Selway wrote that the question whether they were employees may well depend upon the context in which the issue arose: *The Constitution of South Australia*, (1997) at 157.

71 (1906) 4 CLR (Pt 1) 422.

72 (1906) 4 CLR (Pt 1) 422 at 435-436.

73 (1938) 60 CLR 55 at 64.

74 (1906) 4 CLR (Pt 1) 422 at 450.

75 (1956) 94 CLR 193 at 201.

78 The implication expressed in these cases appears to have been made as one of law. The necessity for it[76] was suggested by Dixon J in *Fletcher v Nott*[77] to be found in the character of the police force as "a disciplined force in the service of the Crown". Some executive officers to whom s 51 could apply may not be sworn as police officers[78] and thus not immediately part of that disciplined force. More importantly, however, it may today be doubted whether the blanket denial of any right to procedural fairness by the Commissioner before making a recommendation under s 51(1) of the Act is necessary "lest the contract be deprived of its substance, seriously undermined or drastically devalued in an important respect". The latter expressions, respecting the necessity for implication by law of contractual terms, are those of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*[79].

79 It is unnecessary to express a concluded opinion upon the question of persistence in New South Wales of the "at pleasure principle" in respect of appointments made by the executive government under the power conferred by s 47 of the Constitution Act and otherwise not supported by statute. The powers of appointment and removal of the applicant were created by the Act. Nor is it necessary to determine whether the implied term identified by Griffith CJ continues to have any vitality. This is because the term is expressed, necessarily so, as being controlled by statute.

80 It should be added that the use in argument in the appeal of the term "the prerogative" was inapt. Lord Diplock's remark that what is involved with the "prerogative" is "a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority"[80] indicates why. This litigation arises from exercises of statutory powers by the Commissioner and then by the executive government of the State of New South Wales.

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76 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 447-453.

77 (1938) 60 CLR 55 at 77; cf *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23-24.

78 ss 11 and 33-35 of the Act.

79 (1995) 185 CLR 410 at 453.

80 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409.

The Act

81 The statute with which this appeal turns does not, as did, for example, the Air Force Regulations considered in *Coutts v The Commonwealth*[81], state that the appointment was held "at pleasure" and did "not create a civil contract". It is true that the power of removal of the applicant from his position was exercisable by the Governor in Council "at any time" during the period of the appointment which was specified as ending on 4 February 2005. But the power of removal was not exercisable at will. The exercise of the power was conditioned upon anterior steps by other parties, the making by the Commissioner of a recommendation with the approval of the Minister.

82 In *Fletcher v Nott*[82], rules made under the 1899 Act for procedures dealing with discipline and dismissal of police officers were, in effect and in the language of that time, treated as directory rather than mandatory[83]. However, and properly, no argument was advanced on this appeal that the requirement in s 51(1) respecting the Commissioner was other than critical to the effectiveness in law of an exercise of power by the Governor in Council.

83 Significance was attached by the Court of Appeal to the operation of s 53 of the Act. In particular, it was said that the "capping" provision made in s 53(5) with respect to "compensation" embraced any form of claim for damages for loss of office. Reference has been made earlier in these reasons to s 53. There is an entitlement under s 53(2) to such compensation (if any) as the Remuneration Tribunal determines; the maximum compensation is an amount equal to the remuneration package for 38 weeks (s 53(4)); there is no entitlement "to any other compensation" for removal from office (s 53(5)). Those to whom the section is stated by s 53(1) to apply include "an executive officer who is removed from office under section 51", and "an executive officer who is otherwise removed from office (except for misbehaviour after due inquiry)". The latter description would speak to removals under s 181D. That is not relied upon here. As to s 51, the reference to removal from office would, on ordinary principles of construction, not identify those purportedly, but in law ineffectively, removed. That was this case.

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81 (1985) 157 CLR 91 at 110.

82 (1938) 60 CLR 55 at 69, 75, 78.

83 cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

Conclusion

84 The essential dispute was seen by the Court of Appeal as being whether "the common law dismissal at pleasure principle [was] not qualified by a common law implication of procedural fairness". That, however, posits a false conflict.

85 The applicant held, and was dismissed from, a statutory office, not one created under what appears to be the obsolete or at least obsolescent prerogative power recognised by s 47 of the Constitution Act. By necessary implication, the prerogative found in s 47, and which might have been employed to create the applicant's position as Deputy Commissioner as one at pleasure, was abrogated or displaced by the Act itself[84]. Speaking in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[85] of the principle laid down in *Attorney-General v De Keyser's Royal Hotel*[86], McHugh J said[87]:

> "That principle is that, when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament."

86 It may be accepted that this reasoning would not apply where, as in *R Venkata Rao v Secretary of State for India*[88], the statute providing for the new office and its incidents itself expressly states that the office is held during pleasure. The New South Wales Parliament did not so provide in the Act. Section 51(1) does use the term "at any time" but, as already remarked, that, when read with the balance of the section, is not apt to unfetter that power of the Governor in Council which may be exercised from time to time but only subject to satisfaction of the condition attached to it respecting the Commissioner.

87 The respondents must found upon the implication, as a matter of law, of the term accepted in this field by earlier decisions of this Court. The reasoning

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84 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Barton v The Commonwealth* (1974) 131 CLR 477 at 501.

85 (1997) 190 CLR 410.

86 [1920] AC 508.

87 (1997) 190 CLR 410 at 459.

88 [1937] AC 248 at 256.

which has supported that term did not refer to, and may appear at odds with, that in *De Keyser*. At all events, even if it otherwise be now appropriate to accept the existence of such a term in the Contract, it must be subject to the Act and thus to the considerations, adverse to the respondents, already discussed.

88 When these matters are appreciated, it becomes apparent that there was in the Act no displacement of an obligation of procedural fairness upon the decision-making power of the Commissioner exercised in this case. From that conclusion there follow the legal consequences culminating in the relief granted by Simpson J.

Orders

89 Special leave should be granted, the appeal treated as heard *instanter* and allowed with costs, the orders of the Court of Appeal entered on 8 December 2003 set aside and in place thereof the appeal to that Court dismissed with costs.

CALLINAN J.

Issue

90 This application for special leave was heard by the Court as if it were an appeal. In the Court of Appeal of New South Wales, the question posed was whether the dismissal of an executive officer of the police service pursuant to s 51 of the *Police Service Act* 1990 (NSW)[89] ("the Act") was an exercise of the Crown prerogative to dismiss at pleasure. An alternative formulation proposed by the applicant in this Court is, whether on its proper construction, s 51(1) of the Act empowers the Governor to remove the applicant in disregard of procedural fairness.

Facts

91 The applicant began his career in the New South Wales Police Service on 14 October 1967 as a probationary constable. On 5 February 1997, he was appointed a Deputy Commissioner for a term of three years. This appointment was renewed for a further term of five years on 5 February 2000 by instrument of appointment recorded in a Minute of the Executive Council approved by the Governor. On 28 April 2000, the applicant and the first respondent entered into a contract of employment ("the contract").

The contract

92 Under the heading "Contract Operation and Application", the contract provided:

> "1. This Contract constitutes a contract of employment for the purposes of s 41 of the Act, and governs the employment of the employee while employed in the position referred to in clause 4. *The executive officer is not appointed by, nor is the executive officer's term of office fixed by this contract.*
>
> 2. The parties acknowledge that the employment of the employee is affected by Acts of Parliament and Regulations made under such Acts, including the Act, Public Sector Executives Superannuation Act 1989, Police Regulation (Superannuation) Act 1906 and the Statutory and Other Offices Remuneration Act 1975. The NSW Senior Executive Service manuals, Premier's Memoranda, Premier's Department and Public Employment Office Circulars and

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89 This Act is now known as the *Police Act* 1990 (NSW), see *Police Service Amendment (NSW Police) Act* 2002 (NSW), Sched 1(3).

> Memoranda and other Government directions contain information relevant to the executive officer's employment." (emphasis added)

"The Act" referred to in the contract was the Act to which I have referred.

93 Clause 5 of the contract stated that the period for which the applicant was to hold the position was from 5 February 2000 until 4 February 2005.

94 Under the heading "Duties and Obligations of the Executive Officer", this appeared:

> "6. During the term of the appointment, the executive officer must carry out any duties imposed by law with respect to the position and the additional duties and obligations specified in Schedule A of the Contract.
>
> 7. The duties specified in Schedule A may be varied by a further contract between the executive officer and the employer.
>
> 8. The executive officer agrees to comply with the employer's Code of Conduct and Ethics."

Schedule A of the contract, entitled "Duties and Responsibilities", was expressed to commence from 5 February 2000. It set out in general terms the various duties that the applicant was required to carry out.

95 Under the heading "Performance Agreement and Review", the contract contained these terms:

> "9. The Act provides for an executive officer's performance to be reviewed, at least annually, by the executive officer's employer or some officer nominated by that employer. Any such review is to have regard to the agreed performance criteria for the position and any other relevant matter.
>
> 10. The performance criteria specified in Schedule B may be varied by a further contract between the executive officer and the employer.
>
> 11. The employer must give the officer at least 7 days notice in writing that a performance review is to be conducted.
>
> 12. Within one month of the conclusion of a performance review, or as soon as is practicable thereafter, the employer will prepare and send to the executive officer a written statement which sets out:

(a) the employer's conclusions about the executive officer's performance during the period for which performance was reviewed;

(b) any proposal by the employer to vary the performance criteria as a consequence of the performance review; and

(c) any directions given or recommendations made by the employer to the executive officer in relation to the executive officer's future performance of the duties of the position.

13. The employer undertakes that if a performance review is not held within the time contemplated by s 43 of the Act, this will not operate to the prejudice of the executive officer in any decision made by the employer in relation to the executive officer, unless the failure to hold the performance review within that time was the fault of the executive officer.

14. The employer and executive officer must, as soon as possible after the executive officer receives the written statement referred to in clause 12, attempt to come to agreement on any proposal by the employer to vary the performance criteria and on any recommendations by the employer as to the future performance of the duties of the position by the executive officer."

Schedule B of the contract was entitled "Performance Agreement and Criteria". It provided relevantly as follows:

"The key accountabilities and performance criteria are set out in the attached agreement.

Performance reviews will be based on the performance criteria in the performance agreement attached to this Schedule. The executive officer should ensure the performance criteria remain relevant and are amended as necessary by agreement with the employer to take into account major changes that impact on the executive officer's performance."

96 Without any prior notice to the applicant revealed by the evidence, on 5 September 2001, the Commissioner of Police notified the media that he had recommended to the Minister that the applicant's contract be "terminated on the grounds of performance". Two days elapsed before the applicant received a letter from the Commissioner stating that he had, with the approval of the Minister of Police, recommended to the Governor that the applicant be removed from office "pursuant to the Police Service Act 1990."

97 On 10 September 2001, the applicant was provided with a "Statement of Reasons" signed by the Commissioner and addressed to the Statutory and Other

Offices Remuneration Tribunal ("the Tribunal"). Its purpose was to assist the Tribunal to determine the amount of compensation payable to the applicant under s 53 of the Act. The reasons given were:

> "The principle [sic] matters giving rise to my recommendation were:
>
> 1. The management by [the applicant] of operation issues at Cabramatta. In particular, his recommendations for appointment to senior command positions at Cabramatta and his supervision and management of officers so appointed.
>
> 2. [The applicant's] inaccurate and inappropriate advice with respect to the working environment at Cabramatta with particular emphasis on the working relationships between command staff, operational police and the community in the Cabramatta Local Area Command during 1999 and 2000.
>
> 3. The timeliness and accuracy of advice on operational issues provided by [the applicant].
>
> 4. A series of unsatisfactory judgement decisions on a range of issues."

98 On 12 September 2001, the Administrator, acting under deputation from Her Excellency the Governor, removed the applicant from office with effect from 14 October 2001. The Executive Council Minute recited the Commissioner's recommendation (cf s 51(1)(a)) and the approval of the Minister for Police (cf s 51(1A)).

99 Because the Commissioner made no declaration pursuant to s 51(2)(a), and as the applicant was not appointed to another position in the Police Service, he ceased to be a member of the Police Service from 14 October 2001 (s 51(4), (5)).

100 It should be noted that the Commissioner did not seek to invoke s 181D of the Act for the removal of the applicant on the basis that the Commissioner did not have confidence in the applicant's suitability to continue as an officer, having regard to his competence, integrity, performance or conduct, notwithstanding that the reasons provided to the Tribunal appear to question one or more of these. Reliance on that section would have required prior notice to the applicant and have afforded him statutory rights of review (ss 181D(3), 181E-181J).

101 On 21 November 2001, the Tribunal determined that the applicant was entitled to compensation of $159,175 representing remuneration for 38 weeks from 15 October 2001, the maximum that he could receive in the circumstances of his removal under s 51.

The Act

102 The more relevant of the provisions of the Act should be set out as they were at the time of the applicant's removal from office. Section 40 contemplated appointment for up to five years, not by or pursuant to a contract, but by instrument of appointment. The term of appointment was regulated by s 40 which provided:

> "**40 Term appointments**
>
> Subject to this Act, an executive officer holds office for such period (not exceeding 5 years) as is specified in the officer's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment."

103 Section 41 provided that an executive officer's employment should be governed, *subject to the Act and regulations*, by a contract of employment which might not itself fix the term of employment:

> "**41 Employment of executive officers to be governed by contract of employment**
>
> (1) The employment of an executive officer shall be governed by a contract of employment between the officer and the Commissioner.
>
> (2) A contract of employment may be made before or after the appointment of the executive officer concerned.
>
> (3) An executive officer is not appointed by, nor is an executive officer's term of office fixed by, the contract of employment.
>
> (4) A contract of employment may be varied at any time by a further contract between the parties.
>
> (5) *A contract of employment may not vary or exclude a provision of this Act or the regulations*.
>
> (6) The Commissioner acts for and on behalf of the Crown in any contract of employment between the officer and the Commissioner." (emphasis added)

104 Section 42 dealt with the matters for inclusion in a contract (including duties and remuneration) and for the making, between the parties, of further agreements:

"**42 Matters regulated by contract of employment**

(1) The matters to be dealt with in a contract of employment between an executive officer and the Commissioner include the following:

(a) the duties of the executive officer's position (including performance criteria for the purpose of reviews of the officer's performance),

(b) the monetary remuneration and employment benefits for the executive officer as referred to in Division 5 (including the nomination of the amount of the remuneration package if a range of amounts has been determined for the remuneration package),

(c) any election by the executive officer to retain a right of return to the public sector under s 52.

(2) A contract of employment may provide for any matter to be determined:

(a) by further agreement between the parties, or

(b) by further agreement between the executive officer and some other person specified in the contract, or

(c) by the Commissioner or other person or body specified in the contract."

105 Section 43 made performance reviews, at least annually, mandatory:

"**43 Performance reviews**

(1) An executive officer's performance *must* be reviewed, at least annually, by the Commissioner or by some person nominated by the Commissioner.

(2) Any such review is to have regard to the agreed performance criteria for the position and any other relevant matter." (emphasis added)

106 Section 51(1) and (1A) regulated removal. Significantly they neither required nor even spoke in terms of removal either for reason or cause. But on the other hand they did not contain such familiar language as[90]:

> "... nothing in this Act shall be construed or held to abrogate or restrict the right or power of the Crown to dispense with the services of any person employed ..."

Instead they provided:

> "**51 Removal of executive officers from office**
>
> (1) An executive officer may be removed from office at any time:
>
> (a) by the Governor on the recommendation of the Commissioner, in the case of a Deputy Commissioner or Assistant Commissioner, or
>
> (b) by the Commissioner, in any other case.
>
> (1A) A recommendation referred to in subsection (1)(a) may not be submitted to the Governor except with the approval of the Minister.
>
> (2) The Commissioner:
>
> (a) may declare an executive officer who is removed from an executive position under subsection (1) to be an unattached officer in the Police Service, and
>
> (b) may revoke any such declaration.
>
> (3) While a declaration under subsection (2) remains in force, the person to whom the declaration relates:
>
> (a) is to be regarded as an executive officer, although not holding an executive position, and
>
> (b) is entitled to monetary remuneration and employment benefits as if the person had not been removed from his or her position.

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90 See s 97 of the *Education Commission Act* 1980 (NSW) referred to in *Director-General of Education v Suttling* (1987) 162 CLR 427 and s 54 of the *Public Sector Management Act* 1988 (NSW) referred to in *Kelly v Commissioner of Department of Corrective Services* (2001) 52 NSWLR 533.

(4) If:

(a) an executive officer is removed from an executive position under subsection (1) and a declaration is not made in relation to the officer under subsection (2), or

(b) a declaration under subsection (2) made in relation to an executive officer is revoked,

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

(5) A member of the Police Service who ceases to be an executive officer because of subsection (4) ceases to be a member of the Police Service, unless appointed to another position in the Police Service.

(6) The making of a declaration under subsection (2) in relation to an executive officer does not prevent the officer from ceasing to be an executive officer because of the completion of the officer's term of office.

(7) This section does not prevent an executive officer being removed from office apart from this section."

107 Section 53 provided for compensation without reference to the basis upon which it fell to be assessed, or the relevance of the reason or cause for the removal except to the extent that the "general directions" referred to in s 53(3)(b), which were not before the Court, might bear upon these:

"**53 Compensation where executive officer has no right to return to public sector**

(1) This section applies to:

(a) an executive officer who is removed from office under section 51 and who ceases to be an executive officer as referred to in section 51(4), or

(b) an executive officer who is otherwise removed from office (except for misbehaviour after due inquiry), or

(c) (Repealed)

(d) an executive officer who was employed in the public sector when first appointed as an executive officer, whose term of office as an executive officer expires and who is not re-appointed,

being a person who is not entitled to be engaged in the public sector under section 52.

(2) A person to whom this section applies is entitled to such compensation (if any) as the Statutory and Other Offices Remuneration Tribunal determines.

(3) The Statutory and Other Offices Remuneration Tribunal:

(a) may determine that compensation is payable for the failure to re-appoint an executive officer only if the Tribunal is satisfied that the person had a reasonable expectation of being re-appointed, and

(b) must have regard to any general directions given to the Tribunal by the Minister administering the *Statutory and Other Offices Remuneration Act 1975* as to the matters to be taken into consideration when it makes determinations under this section.

(4) The maximum compensation payable is an amount equal to the person's remuneration package for the period of 38 weeks.

(5) The person is not entitled to any other compensation for the removal or retirement from office or for the failure to re-appoint the person or to any remuneration in respect of the office for any period afterwards (except remuneration in respect of a subsequent re-appointment to the office).

(6) An executive officer who is removed from office or not re-appointed is not entitled to compensation under this section if:

(a) the person is appointed on that removal or expiry of the term of office to another executive position, and

(b) the remuneration package for the holder of that position is not less than the remuneration package for the holder of the former position.

(7) If the Statutory and Other Offices Remuneration Tribunal determines that compensation is payable under this section, it must, in its determination, specify the period to which the compensation relates.

(8) The person may not be engaged in the public sector during the period so specified, unless arrangements are made for a refund of the proportionate amount of the compensation."

108 Despite s 43 of the Act and cl 9 of the contract, it was common ground that no performance review was conducted during the term of the applicant's service.

The proceedings at first instance

109 The applicant commenced proceedings against the first respondent by summons filed on 20 September 2001 in the Supreme Court of New South Wales seeking various declarations of invalidity of the termination of his office, breach of contract, damages and costs. The second respondent, the State of New South Wales, was joined as a party, by consent, during the hearing. The matter was heard by Simpson J who declared the applicant's removal from office to be invalid, and awarded him $642,936.35 in damages[91].

110 The applicant argued before her Honour that he was entitled, before being removed from office, to be accorded procedural fairness which required advice, before his removal, that it was under consideration, and that he should have been given an opportunity to be heard on the question whether he should or should not be removed. Worse, he submitted, he was not told of any specific allegations against him, and not given any opportunity to respond to them. The respondents accepted that these asserted facts were true.

111 The respondents' defence was that they were not required to afford procedural fairness to the applicant, and could remove him from office at any time without explanation, justification or excuse.

112 In making the declarations that she did, Simpson J said[92]:

> "In my opinion, the recourse had by the [respondents] to early authority concerning the entitlement of the Crown to act in relation to its employees or appointees in the high-handed manner for which they contend is, in the twenty-first century, and in the light of modern authority, misplaced. The focus in the Act on merit as the basis of appointment, and the requirement of annual performance reviews, support that view. That conclusion is the more acceptable because the basis for the recommendation for the [applicant's] removal was specifically to do with the manner in which he performed his duties. It was not to do with the general structure of the Police Service or policy decisions in relation to that service. The [applicant] was entitled, not only to the benefit of a review of his performance in accordance with s 43, but also, when his

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91 *Jarratt v Commissioner of Police for NSW* (2002) 56 NSWLR 72.

92 (2002) 56 NSWLR 72 at 84-85 [43]-[44].

> removal was being contemplated on performance grounds, to be notified of that fact and given an opportunity to respond to the proposal and the criticisms of his performance. Further, he was entitled to be advised of any specific allegations against him, and to the content of any adverse report, and to be given an opportunity to respond to those.
>
> He was denied each of those opportunities. The decision of the Commissioner to recommend to the Governor that the [applicant] be removed from his office was legally flawed and is invalid."

113 Simpson J made declarations of breach of contract and unlawful removal, and awarded the applicant damages corresponding to the salary that he would have been paid for the balance of the unexpired term of five years, less an allowance for sums earned in the meantime, the compensation that he received from the Tribunal, and an amount that he could otherwise be expected to earn before the expiration of the term.

The Court of Appeal

114 The respondents successfully appealed to the Court of Appeal (Mason P, Meagher and Santow JJA). The reasons of the Court were delivered by the President with whom the other members of the Court agreed. After reciting the facts and referring to authority affirming the durability of the Crown prerogative despite academic and other criticisms of it, the President stated the question in this way: "whether the principle [of Crown prerogative] was abrogated by the Act". His Honour said[93]:

> "Some of the reasoning in early cases applying the dismissal at pleasure principle turned upon the absence of any contractual relationship, or the designation of the contract as 'unilateral' in the sense of binding only the Crown employee[94].
>
> The mere existence of a contract does not exclude the Crown's right to dismiss at will[95]. This is so, whether the principle is seen as a prerogative or as a term of the contract (implied at law or in fact) that has not been displaced.

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93 *Commissioner of Police (NSW) v Jarratt* (2003) 59 NSWLR 87 at 108 [72]-[76].

94 See, eg *Fletcher v Nott* (1938) 60 CLR 55 at 68.

95 *Reilly v The King* [1934] AC 176 at 180; *Kodeeswaran v Attorney-General (Ceylon)* [1970] AC 1111 at 1123.

> There is much debate as to whether a valid contract for a fixed term excludes the Crown's right under the principle. ... This debate has no bearing on the present case, because the [applicant's] contract went out of its way to negate any suggestion that it was fixed as regards its term ... Not only was the contract silent as to any such provision. More to the point, the Act stipulated most clearly that an executive officer's term of office was not (that is, could not be) fixed by the contract of employment (s 41(3). See also s 41(5) and s 61). In *Director-General of Education (NSW) v Suttling* Brennan J (with whom Mason CJ and Deane J agreed) said[96]:
>
> > 'If the relationship is contractual, the contract must be consistent with any statutory provision which affects the relationship. No agent of the Crown has authority to engage a servant on terms at variance with the statute. To the extent that the statute governs the relationship, it is idle to inquire whether there is a contract which embodies its provisions. The statute itself controls the terms of service.'
>
> For this reason it was, in my view, not open for any declaration of breach of contract to have been made. Nor should the case have proceeded as if *contractual* damages were to be assessed as on a wrongful dismissal. An employee's action for damages for wrongful dismissal is at bottom a claim based on breach of the employer's promise of work for a fixed term or, alternatively, for an indefinite period terminable only upon due notice. This contract had no such conditions.
>
> Declaration 2 [that the Commissioner acted contrary to the Act in breach of contract] must therefore be set aside on this ground alone."

115 His Honour then turned his mind to the other declarations made by the primary judge that there had been contravention of the applicant's statutory rights. He rejected as material each of the indicators, relied upon by the applicant, of a legislative intention to exclude what he had earlier referred to as the "dismissal at pleasure principle", these being: the requirement of an annual review (s 43); the limited exclusion of judicial review (s 44); the absence of express provision for retention of the principle; and the alternative provision for removal subject to procedural fairness (s 181D).

116 The parties focused particularly on s 51 of the Act, in respect of which, the President said[97]:

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96 (1987) 162 CLR 427 at 437-438.

97 *Commissioner of Police (NSW) v Jarratt* (2003) 59 NSWLR 87 at 113-114 [113].

"I have not overlooked these passages in relation to my respectful disagreement with Simpson J as regards the application of *Annetts*[98]. Without, I trust, being circular in my reasoning, I cannot detect the same intensity of indicators in s 51 supporting the direct implication of a duty of procedural fairness. Conversely, s 51 strikes me as standing in the long line of provisions affirming and applying the dismissal at pleasure principle as an opportunity of last resort to the Executive in the efficient administration of a disciplined police force. The words 'at any time' suggest this. So too does the fact that Parliament has seen fit to ameliorate the impact of summary dismissal by conferring rights of return to public sector employment and of compensation (s 52 and s 53) upon those removed from office by the sharp hand of s 51."

117 Regarding damages, the subject of a discrete challenge by the respondents, his Honour concluded[99]:

"The point that was taken, and which I would uphold, is that s 53 (subs (5) in particular) reinforces the conclusion that s 51 is not circumscribed in the way found by Simpson J. Section 51 restates the dismissal at pleasure principle, but qualifies it by the procedural requirements found in s 51(1) and s 51(1A) and mitigates its harsh impact by the provisions made in s 52 and s 53.

I see no reason why the reference in s 53(5) to 'compensation' does not embrace any form of claim for damages for loss of office. It is difficult to see what else could be envisaged. As Dixon J put it in *Nelungaloo Pty Ltd v Commonwealth*[100]:

> 'Now "compensation" is a very well understood expression ... It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived. Compensation prima facie means recompense for loss ...'

In *McKerlie v State of New South Wales*[101] Dunford J construed a corresponding section in the *Public Sector Management Act* 1988 [NSW]

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98 *Annetts v McCann* (1990) 170 CLR 596.

99 *Commissioner of Police (NSW) v Jarratt* (2003) 59 NSWLR 87 at 117-118 [138]-[140].

100 (1948) 75 CLR 495 at 571.

101 [2000] NSWSC 998.

(s 55) as precluding a claim for damages for wrongful dismissal being brought by a person dismissed at pleasure from a Crown office. I agree with this decision and would apply its reasoning to s 53(5)."

Disposition of the appeal

118 The first task is to construe s 51 in the context of the Act as a whole. Having done so, I have decided that the section does not exclude the rules of procedural fairness. First, I would however point out that the police force, or, as it is now called, the Police Service, is different in many ways from other organs of the Executive. It is an armed, uniformed body of special state employees, entrusted with many intrusive and unique powers, required to act in conformity with high standards of discipline and integrity, and bound to submit to rigorous supervision.

119 Historically, even though police officers are paid and appointed by the state, the state is not, in the absence of statutory mandate, vicariously liable for their actions: a police officer is not an agent or servant of the Crown. The incidents of the relationship between the Crown and a police officer, and the personal obligations of the latter are fully explained in *Enever v The King*[102]. At an early stage differences emerged between the roles in the colonies of police officers, and the relationship between them and the Colonial Secretary or other police ministers on the one hand, and the police force and the government and local authorities in the United Kingdom, on the other. In *Police and Government: Histories of Policing in Australia*, Professor Finnane makes the following observation in respect of the historical evolution of the relationship[103]:

> "For all of the Australian colonies, therefore, the control of police was from the earliest moment vested in the governor. Yet the path from the governor's prerogative in the appointment of constables or police magistrates to the enactment of legislation authorising centralised police forces under single police heads with substantial autonomy was not inevitable. It was fought out in often contentious circumstances."

The author's further observation suggests that the intrusion of politics into policing is no new matter[104]:

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102 (1906) 3 CLR 969 at 975-977 per Griffith CJ; *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237; affirmed [1952] AC 457; *Griffiths v Haines* [1984] 3 NSWLR 653.

103 Finnane, *Police and Government: Histories of Policing in Australia* (1994) at 16.

104 Finnane, *Police and Government: Histories of Policing in Australia* (1994) at 44. See also s 8(1) of the Act which subjects the Commissioner to the direction of the Minister in the management and control of the Police Service.

> "It is difficult not to conclude that the relationship between police minister and police commissioner will continue to be a contentious one. Reviewing the arrangements in different Australian States, the Queensland Public Service Management Commission concluded in 1993 that 'the experience from all jurisdictions indicates the degree of difficulty involved in defining an appropriate relationship between the Minister and the Police Commissioner'. The division of labour in modern cabinet government has produced ministries with ever closer identification of ministers with important domestic portfolios. A century ago police administration was just a sub-branch of the colonial secretary's office in most colonies. A specific portfolio of police is a quite recent development in most States. Only in Western Australia does it predate the Second World War, with Tasmania the only other State having a separate police ministry before 1960. Today all States have a distinct portfolio, though sometimes linked to other ministerial responsibilities." (footnotes omitted)

120 Factors to which I have referred have implications both favouring and adverse to the applicant's case. The latter include the public interest in the availability of the means of ready dismissal and speedy rectification of lapses on the part of police officers, and the conventional but not unreasonable abstention of the responsible minister from intervention in operational police matters. The former include that the obligations and rights have now almost entirely been the subject of detailed legislation, and accordingly that any presumption of the survival of a relevant Crown prerogative should not lightly be made.

121 Schedule 2 of the Act makes provision for two positions of Deputy Commissioner. The position ranks immediately below that of Commissioner. Section 3 of the Act defines merit and requires that appointments and recommendations be made on the basis of it:

> "***merit***, in relation to a decision of the Commissioner to appoint or recommend for appointment a person to a position in the Police Service, means:
>
> (a) the possession by the person of qualifications determined in respect of the position by the Commissioner, and
>
> (b) the aptitude of the person for the discharge of the duties of the position, and
>
> (c) the integrity, diligence and good conduct of the person."

122 It might therefore reasonably be assumed that the applicant must have been appointed on merit and that accordingly, subject to the Act, would retain his position for its term unless his service ceased to be meritorious.

123 Section 8 of the Act makes the Commissioner responsible for the management and control of the Police Service subject to the direction of the Minister. That section obliges the Commissioner to do that economically and efficiently. Section 28(7) uses some of the same language as s 53(1)(b), "for misbehaviour after due inquiry". The statutory regime for removal of other officers sheds no light on the understanding of the regime for the removal of executive officers of whom the applicant was one, and understandably so because no doubt of the eminence of his position and the special need for confidence in his performance in it.

124 Pursuant to s 33 of the Act, a Deputy Commissioner is a member of the Police Service Senior Executive Service. By s 36, appointments to that service are made by the Governor on the recommendation, in the case of a Deputy Commissioner, of the Commissioner. Section 39(2)(b) provides that a vacancy to an executive position filled after advertisement must be on merit. Only current officers may be so appointed absent advertisement, and the appointee must be the officer having "the greatest merit". I regard these provisions as providing another indication, albeit a slight one, that some reason would ordinarily be required to be demonstrated as a ground for removal of the appointee.

125 A further such indication is the requirement, by s 40 of the Act, of an appointment for a term up to, and in this case of, five years. The legislative requirement of a fixed term does suggest that the term will be served, subject to an absence of reason for its abbreviation, and of course the Act. An appointee could be expected, and could readily be understood by the appointer to be expected, to arrange his affairs on that basis. True it is that both should also be taken to be aware of the Act and its provision for earlier removal, but that does not mean of itself that it should also be taken that earlier removal will, or may be effected capriciously, or without notice, or otherwise procedurally unfairly. It would have been very easy for the legislature to have explicitly provided that a relevant appointment should not be for any fixed term, or should be indefinite, or was expressly terminable at pleasure, or without notice, reason or cause. Section 51(1) of the *Police Act* 1990 (NSW) was amended by the *Public Sector Employment and Management Act* 2002 (NSW) and now reads: "An executive officer may be removed from office at any time for any or no reason and without notice ... ." For myself, I would have regarded that amendment as significant, but there is a question as to the extent to which subsequent legislation may be used to construe and ascertain the intention of earlier enactments[105]. Section 41 is relevant. Subject to the Act (s 41(5)), the contract (for the term of five years specified by the officer's *instrument of appointment*) is to govern the employment. Section 41(6) does however make it plain that the Commissioner

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105 *Commissioner of State Revenue (Victoria) v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at 670 [54].

acts for and on behalf of the Crown, providing accordingly, by its reference to the Crown, a counter indication to the abolition by, and for the purposes of the Act, of a prerogative or privilege of the Crown.

126 Section 42 compels the inclusion in the contract of "performance criteria for the purpose of reviews of the officer's performance". The section refers in terms to the contract as a contract of employment. The notion of a contract of employment, and periodic reviews of performance under it, does not, absent express statutory indication otherwise, sit comfortably with a right to end the contract summarily, and without reason, or a notice, or a right to question the reason relied upon for its termination.

127 Section 44 is an extensive privative provision. It provides that any question or dispute about an officer's employment is not an industrial matter for the purposes of the *Industrial Relations Act* 1996 (NSW). It excludes an appeal to the Police Tribunal or to the Government and Related Employees Appeal Tribunal ("GREAT"), and s 44(7) forbids prerogative and related relief in respect of the appointment, or failure to appoint a person to a vacant position. Not much assistance, I think, can be derived from this. The sub-section is simply not concerned with dismissals, suspensions or removals from office.

128 Division 5 of Pt 5, ss 45 to 47, deals with remuneration and allowances and may be passed over.

129 It is Div 6 of Pt 5 containing s 51 that is of greatest importance and which must be most closely examined, as much, it may be observed, for what it does not say, as what it does say. And what it does not say is that an executive officer may be removed without reason, at pleasure, summarily or without notice, and without compensation. The process for which s 51 provides is recommendation by the Commissioner, approval of it by the Minister, and actual removal by the Governor, that is to say the Governor with the advice of the Executive Council (s 14 of the *Interpretation Act* 1987 (NSW)). This is quite an elaborate procedure. It is a procedure quite different from a simple and unqualified dismissal by the Governor in the exercise of some kind of Crown, reserved or special gubernatorial power, or indeed by the Governor as defined, in the exercise of an unrestricted non-statutory Executive power. The fact that both the engagement and the removal are carried out under an enactment is itself significant. Why make statutory provision for any of this if all that is involved, or is to be left unimpaired, is naked Crown privilege or prerogative? The fact also that a recommendation has to be made is significant: so too that an approval by the Minister is a prerequisite. A recommendation is unlikely to be required unless it is to be a recommendation for a reason or reasons. The same may be said of the approval of the Minister. The approval or disapproval of the Minister is unlikely to be required and given without reason. If it were otherwise, both the recommendation and the approval and the statutory provision for them would be seen and read as meaningless formalities when, if dismissal at pleasure were

available, there was no need of them. I should say that "reason" may not necessarily mean "cause", a matter which I will address later. What I have said of s 51 however stands, by itself, as a powerful indicator that Crown prerogative does not bear upon the case.

130 The first thing to be noticed about s 53 is that it is to apply indiscriminately to an executive officer, that is to say, all executive officers removed under s 51 (except for officers removed for misbehaviour after due inquiry). This means that it may apply to compensate executive officers who are, or have become, incompetent or are otherwise without merit, as well as, for example, officers who are no longer required due to no fault on their part. Section 53(2) makes provision for the assessment of compensation (if any) for an executive officer's removal in such amount as the Tribunal determines. In so doing the Tribunal must have regard to any general directions given to it by the Minister administering the *Statutory and Other Offices Remuneration Act* 1975 (NSW) in making a determination (s 53(3)(b)). The Court has no evidence as to whether these relate to the merit, conduct, efficiency or the integrity of an officer or to the amount of compensation he should receive; but even if they do, they cannot alter the construction of the Act. Section 53(4) limits the compensation to the equivalent of the officer's "remuneration package" for a period of 38 weeks. Officers whose positions are abolished or changed are to have no greater rights to compensation (s 57(3)).

131 The topic with which Pt 9 deals is the management of conduct within the police service. Sections 173-181 make extensive provision for notice of misconduct and unsatisfactory performance, and for reviews of decisions by the Commissioner in relation to such a matter.

132 The respondents place weight on the presence of s 181D in the Act which relevantly provided as follows:

"**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.

...

(7) Except as provided by Division 1C:

(a) no tribunal has jurisdiction or power to review or consider any decision or order of the Commissioner under this section, and

(b) no appeal lies to any tribunal in connection with any decision or order of the Commissioner under this section.

In this subsection, ***tribunal*** means a court, tribunal or administrative review body, and (without limitation) includes GREAT and the Industrial Relations Commission.

(7A) Nothing in this section limits or otherwise affects the jurisdiction of the Supreme Court to review administrative action.

...

(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."

133 Section 181E makes provision for an application by an officer for a review of the Commissioner's decision under s 181D by the Industrial Relations Commission on the ground that the removal was harsh, unreasonable or unjust. Section 181F prescribes the steps which the Commission must take, and the matters to which regard must be had in undertaking a review, and imposes the onus upon an applicant to establish harshness, unreasonableness or injustice.

134 It is the respondents' submission that the provision, by s 51 and s 181D, of two quite separate regimes for the removal of an executive officer, is the clearest

possible legislative indication that each should be given full scope, that the plain differences between them should be recognised, and, in particular, that it should be accepted that whilst s 181D provides in explicit detail for notice and review, s 51 deliberately and unmistakably does not: no implication should therefore be made by the Court of any requirement of notice or judicial oversight of any kind in respect of removal under the latter section. The rational basis for that distinction was said to be that s 51 was intended to deal with urgent and clear cases, and s 181D with cases of lesser urgency or importance.

135 This submission of the respondents has considerable force. I do not think however that the fact that s 181D of the Act provides for the procedures that it does, necessarily leads to the conclusion that s 51 either embodies, or simply restates the "dismissal at pleasure" principle, or should otherwise be read as intended to exclude the rules of natural justice. In resolving a question of this kind, the authorities to which I will refer require that careful regard be had to the scope, purpose and objects of the enactment in question, as well of course to the sorts of contextual indications in the Act which I have discerned and discussed. This is not to say that the right of the Crown to dismiss at pleasure, whether characterized as a prerogative of the Crown, or an implied term of a contract with it, absent statutory intervention, has in some way dwindled into obsolescence. The applicant rightly accepted this to be so. Its rationale lies in the requirement, as a matter of public policy, that the Crown have the power to act in the public interest, or for the public good, if the continued employment of its servants might be detrimental to the interests of the State[106]. In *Shenton v Smith*[107] the right to dismiss was held not to derive from a special Crown prerogative, but to be based upon the somewhat unlikely assumption of a common understanding that the Crown could dismiss its servants at pleasure "because such are the terms of their engagement, as is well understood throughout the public service"[108]; and in *Dunn v The Queen* this was said to be so because there was "imported into the contract

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106 *Shenton v Smith* [1895] AC 229 at 235; *Dunn v The Queen* [1896] 1 QB 116 at 118, 120; *Gould v Stuart* [1896] AC 575 at 578; *Carey v The Commonwealth* (1921) 30 CLR 132 at 137; *Lucy v The Commonwealth* (1923) 33 CLR 229 at 238, 249, 254; *Fletcher v Nott* (1938) 60 CLR 55 at 67-68; *Kaye v Attorney-General for Tasmania* (1956) 94 CLR 193 at 198; *Coutts v The Commonwealth* (1985) 157 CLR 91 at 103, 105; *Suttling v Director-General of Education* (1985) 3 NSWLR 427 at 445, 446; *Kelly v Commissioner of Department of Corrective Services* (2001) 52 NSWLR 533 at 558.

107 [1895] AC 229.

108 [1895] AC 229 at 234-235 per Lord Hobhouse.

for the employment ... the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure"[109].

136 The alternative view is that the right of dismissal "flows from statute or the prerogative"[110] or derives "from the residue of the Sovereign's prerogative ... or from the common law as subsuming that prerogative ..."[111].

137 It is unnecessary to explore in this appeal the true nature of the right or prerogative, or the extent of its current vitality[112] because, in my view, the relevant sections of the Act to which I have referred in some detail, manifest an intention to displace or replace it to some extent at least. In reaching that conclusion I have been influenced by three cases in this Court one of which is a very recent one. In the first, *Salemi v MacKellar [No 2]*[113], Gibbs J made it plain that in a case of a statutory power, the question (as to a requirement of procedural fairness) will depend upon the true construction of the statutory provision in light of the common law presumptions.

138 The second is *Annetts v McCann* in which Mason CJ, Deane and McHugh JJ said this[114]:

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of

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109 [1896] 1 QB 116 at 119 per Lord Herschell.

110 *Coutts v The Commonwealth* (1985) 157 CLR 91 at 105 per Brennan J.

111 *Suttling v Director-General of Education* (1985) 3 NSWLR 427 at 437 per Kirby P.

112 The Crown's right to dismiss at pleasure has been described as "exceptional", "anachronistic", "curious", "doctrinally erroneous" and a "cause of blatant injustice": see *Coutts v The Commonwealth* (1985) 157 CLR 91 at 105, 106; *Commissioner of Police for New South Wales v Jarratt* (2003) 59 NSWLR 87 at 107 [68]; *Suttling v Director-General of Education* (1985) 3 NSWLR 427 at 446, 447. See also the following academic writings to a similar effect: Nettheim, "*Dunn v The Queen Revisited*", (1975) 34 *Cambridge Law Journal* 253; Campbell, "Termination of Appointments to Public Offices", (1996) 24 *Federal Law Review* 1 at 17-26.

113 (1977) 137 CLR 396 at 419.

114 (1990) 170 CLR 596 at 598.

> necessary intendment ... In *Tanos*[115], Dixon CJ and Webb J said that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from 'indirect references, uncertain inferences or equivocal considerations'. Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice ... In *Kioa v West*[116] Mason J said that the law in relation to administrative decisions 'has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.' In *Haoucher*[117] Deane J said that the law seemed to him 'to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognized as applying generally to governmental executive decision-making." (some footnotes omitted)

139 Words of necessary intendment to the contrary of procedural fairness, do not, as I have said, appear in Div 6 of Pt 5 (ss 48-54) or elsewhere in the Act. The words "at any time" in s 51 do not convey it. Those words may make it clear that the making of a contract by way of instrument of appointment, for a term does not mean that the term will necessarily run its length, but that does not mean that the scope, purposes and objects of the Act should be taken to be irrelevant to a removal at any time, otherwise than in accordance with the rules of natural justice adapted of course according to the scope, purposes and objects of the Act, and its intendment with respect to removal as stated by the express statutory language that deals with the topic.

140 The third of the cases is *Sanders v Snell* in which Gleeson CJ, Gaudron, Kirby and Hayne JJ said[118]:

> "Whatever may be the content or the continued utility of [the doctrine of legitimate expectation] it has long been held that the repository of statutory power should afford procedural fairness to those whose livelihood is affected by the exercise of that statutory power."

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115 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

116 (1985) 159 CLR 550 at 584.

117 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653.

118 (1998) 196 CLR 329 at 348 [45].

141 The scope of the Act is generally a comprehensive one, to deal with all matters affecting the Police Service. In that respect, it would be unlikely that it intended to leave intact the "dismissal at pleasure" principle. The preamble of the Act states in terms that it is to provide, among other things, for the employment of police officers. The purpose and objects of the Act appear from s 7 which states the values of the Police Service, and s 8(2) which imposes upon the Commissioner a duty to manage the service effectively, efficiently and economically.

142 Procedural fairness is not incompatible with that duty. Indeed, a requirement of procedural fairness by its beneficial effect on morale and the influence that it may have on policing generally is likely to enhance efficiency. So too an understanding that the Commissioner will be required to act in a procedurally fair way in making and terminating appointments can only serve to maintain public confidence in, and therefore public co-operation with, the Police Service.

143 Certainly the Commissioner, and even perhaps the Minister, were bound to afford the applicant procedural fairness, and this they failed to do. The fact that the former only recommended, and the latter merely approved the recommendation, and that the final decision was formally, at least, the decision of the Governor-in-Council, does not deny the requirement of procedural fairness[119]. Because however the case focused on the recommendation, and not the approval, it would not be right to decide and to declare that the Minister denied the applicant procedural fairness.

144 It follows that the appeal must be allowed but not that the declarations made by the primary judge should be restored. Declarations 1, 2 and 3 made by her Honour should not be restored. These, referring as they do to the requirements of the Act and the contract are inappropriate, particularly the second which declares that there has been a breach of contract. There is nothing in the contract which requires that the applicant be afforded procedural fairness and accordingly failure to do so was not a breach of it. The obligation to ensure procedural fairness to the applicant stems from the common law which was not displaced by the Act. I would however in substance restore the fourth declaration that was made by the primary judge with the deletion of the reference to the applicant's contract of employment. The declaration would then read as follows: "Declare that the first respondent in making a recommendation to the Governor that the applicant should be removed from his office as Deputy Commissioner of

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119 In *Sanders v Snell*, it was contemplated that relief was available against the Minister who merely recommended and was not the ultimate decision maker: (1998) 196 CLR 329 at 347-348 [43]-[45].

the New South Wales Police Service, failed to afford to the applicant procedural fairness thus rendering the decision to remove the applicant from office invalid."

145 Two further matters need discussion. The first is the content of procedural fairness in this case. In my view, the Commissioner and perhaps the Minister should have given the applicant reasonable notice of their intention to recommend removal and to approve respectively. The notice should have given a reason or reasons for the recommendation and arguably also the approval. As Lord Reid pointed out in *Ridge v Baldwin*, if the reason for the decision is not known, whether or not the decision maker is bound to give it to the person affected by the decision, it is not possible to determine the fairness or otherwise of the latter's case against the making of the decision[120]. I have deliberately chosen "reason" or "reasons" rather than "cause" because the latter may imply a need for some dereliction in duty before removal. The Act, when the Commissioner proceeds under s 51 does not require that. Without attempting to be comprehensive, incompatibility, restructuring, or the emergence of a superior performer might well and quite properly provide a reason for removal. But it must be assumed that there be a reason in fact capable of articulation and communication to the officer concerned; otherwise caprice might rule. The applicant should also have been given the opportunity to attempt to persuade the Commissioner and perhaps the Minister not to proceed, even if the reason be any of the three that I have suggested as possible examples of a sufficient reason.

146 The respondents argued that on no view was the applicant entitled to damages; the limit of his entitlement was the compensation which he had been paid equating with 38 weeks of salary. I would reject that argument although what the applicant was entitled to receive and was awarded by the trial judge was not properly characterizable as damages for breach of contract. I have held that the applicant's removal was invalid. He therefore remained in office and was entitled to the emoluments of his office for the period that he could have expected to serve in it. In some respects this case is analogous with *Lucy v The Commonwealth*[121] in which it was declared that the office of a public servant had been wrongfully terminated. Starke J said that in such a case damages for wrongful removal or dismissal from office are not available. But his Honour went on to say that there is no difficulty in applying the general law in relation to servants who are wrongfully discharged from their service, and that the measure of damages is not the wages agreed upon but the actual loss sustained, including compensation for any wages of which the servant was deprived by reason of his dismissal. His Honour applied that measure in the case of the plaintiff there and I would accordingly do the same here with the result that the award made by the

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120 *Ridge v Baldwin* [1964] AC 40 at 65-66.

121 (1923) 33 CLR 229.

trial judge should stand. The respondents argued that the applicant should not be compensated for the whole of the balance of the unexpired term of his appointment; to do so made no allowance for contingencies and vicissitudes in particular, the possibility, indeed the likelihood, that had he been afforded procedural fairness his appointment would still have been terminated well before the balance of the five years elapsed. This is an argument which may be compared with an argument of a failure to mitigate, the onus in respect of which lies upon a defendant. No reason for removal was proved or suggested, and hence there was no evidence of how the applicant might have responded to it. This means that the Court cannot make any assessment of the validity of the respondents' assertions and argument in this regard[122]. In those circumstances, and because the removal was invalid and no further attempt at removal was made, the applicant must be taken as having remained in office and being entitled to its emoluments in full, subject only to the deductions actually made by the trial judge.

147 The orders that I would make therefore are as follows:

1. Order that there be special leave to appeal from the decision of the Court of Appeal of New South Wales of 11 November 2003.

2. Order that the hearing of the application for special leave be treated as the hearing of the appeal.

3. Order that the appeal be allowed.

4. Order that the respondents pay the applicant's costs application for special leave to appeal in this Court, and of the appeal.

5. Set aside the orders of the Court of Appeal and of Simpson J made on 5 July 2002 and in lieu thereof make the following declaration and orders:

   (a) Declare that the first respondent in making a recommendation to the Governor that the applicant should be removed from his office as Deputy Commissioner of the New South Wales Police Service, failed to accord to the applicant procedural fairness thus rendering the decision to remove the applicant from office invalid.

   (b) Judgment for the applicant against the respondents in the sum of $642,936.35.

   (c) Order that the respondents pay the applicant's costs of the trial and the appeal to the Court of Appeal.

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122 cf *Ridge v Baldwin* [1964] AC 40.

148 HEYDON J. The circumstances and principal statutory provisions are set out in Callinan J's reasons for judgment.

149 His proposed orders 1 to 4 and 5(b) and (c) should be made for the following reasons.

The position of Deputy Commissioners

150 The present applicant had been in the police force for 30 years before the five year appointment involved in this case was made. He had held a three year appointment as Deputy Commissioner in the period immediately before it was made. Occupants of so senior a statutory office as Deputy Commissioner of the New South Wales Police Service will not usually have attained it without building up a considerable reputation for competence and integrity over a number of years. The peremptory termination of an appointment to a senior statutory office of this kind, apart from its effects on the occupant's income, is likely to be very damaging to that reputation. This is so particularly where, as here, the only public indication given as to the grounds for termination was the word "performance". An event of this kind is likely to disable the person removed from the office from ever obtaining an equivalently senior appointment. Indeed it is also likely to make it difficult for that person to get very many opportunities for employment at all. The proposition that these consequences must be allowed to flow without the person to be removed being informed why, and without any chance to oppose that course, is a very extreme one. Strong statutory language to the contrary would be needed to make it convincing.

151 Hence, unless the *Police Service Act* 1990 (NSW)[123] ("the Act") otherwise provided, the Commissioner had a duty to afford procedural fairness in deciding whether to recommend to the Governor in Council that the applicant be removed from office. Procedural fairness required the Commissioner to give notice of an intention to recommend removal and to consider anything that the applicant said in response to that notice. Since the respondents conceded that if there was a duty of procedural fairness it had not been complied with, it is unnecessary to consider its precise content further.

The legislative scheme

152 The appointment of a Deputy Commissioner was to be made by the Governor on the recommendation of the Commissioner (s 36(1)(a)). The Commissioner was obliged not to recommend the applicant's appointment to that office unless in the opinion of the Commissioner he had "the greatest merit"

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123 This Act is now known as the *Police Act* 1990 (NSW): see Sch 1(3) of the *Police Service Amendment (NSW Police) Act* 2002 (NSW).

(s 39(1)(b) and (2)(b)). Questions of "merit" were to be judged by reference to his qualifications, aptitude, integrity, diligence and good conduct (s 3). At the time when the applicant was appointed to the office from which he was dismissed, it was also the duty of the Commissioner not to recommend the applicant's appointment without inquiring into the applicant's integrity (s 39(3)(a)) and without having regard to any information that came to the Commissioner's attention whether as a result of those inquiries or otherwise (s 39(3)(b) and (4)). No doubt that inquiry was made, and no doubt the answer did not question the applicant's suitability in that respect[124]. The office from

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124 At the relevant time s 39 provided:

> "(1) In deciding to make a recommendation for the appointment of a person to a vacant executive position which has been duly advertised:
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> (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) In deciding to make a recommendation for the appointment of a person to a vacant executive position which has not been duly advertised:
>
> (a) the Commissioner may only select a member of the Police Service who is a police officer or an administrative officer (as the case requires), and
>
> (b) the Commissioner must, from among the eligible members of the Police Service, select the member who has, in the opinion of the Commissioner, the greatest merit.
>
> (3) It is the duty of the Commissioner, before recommending the appointment of, or appointing, a person to a vacant executive position:
>
> (a) to make inquiries (from the Police Integrity Commission and from any other person or body the Commissioner considers appropriate) as to the person's integrity, and
>
> (b) to have regard to any information that comes to the Commissioner's attention (whether as a result of inquiries under paragraph (a) or otherwise) as to the person's integrity.
>
> (4) The Police Integrity Commission is required to furnish a report to the Commissioner (on the basis of information available to it and without

(Footnote continues on next page)

which the Deputy Commissioner was to be removed was, by reason of s 40 and the applicant's instrument of appointment, in this case, one for a five year term. It was subject to the power to remove conferred by s 51, but it would ordinarily be assumed that once a five year term had been selected, it would endure unless some good contrary reason emerged. If this were not so, the terms of appointment would be self-contradictory: the appointment would be for five years or any shorter period as decided at any time within the five years. The statutory duty on the Commissioner or the Commissioner's nominee to review the officer's performance (s 43(1)) by reference to the criteria set out in the officer's contract (ss 42(1)(a) and 43(2)) also suggests that the appointment would continue unless some good contrary reason emerged.

153 In argument before this Court some attention was devoted to the question of what limits, if any, there were to the grounds on which the Commissioner could act in making a s 51 recommendation. The respondents submitted that the Commissioner could have acted for good reasons, no reasons or bad reasons, including bad faith. That submission must be rejected. In the absence of contrary statutory language, it cannot be concluded that the Commissioner was entitled to act on whim, caprice or malice; rather he was obliged to exercise his s 51 power, as much as his other responsibilities, with a view to the effective, efficient and economical management of the Police Service (s 8(2)). It is convenient to proceed on an assumption favourable to the respondents – that the Commissioner's power was not more narrowly limited. Hence, it is unnecessary to decide whether a recommendation could only be based on some "fault" in the person whose dismissal was recommended, or whether there had to be some other "cause" for doing so[125].

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the need for any special investigation or inquiry) on any person the subject of an inquiry referred to in subsection (3) (a).

(5) As soon as practicable after a person is appointed to a vacant executive position, the Commissioner is required to notify the Police Integrity Commission of the identity of the person so appointed."

125 It would seem, however, that in order to act under s 51 the Commissioner did not need to have lost confidence in the Deputy Commissioner's suitability to continue as a police officer by reason of the factors of competence, integrity, performance or conduct. Those were the criteria set out in s 181D(1); they applied in relation to all police officers, not to the smaller class of executive officers listed in Sched 2, and in particular not in that narrow segment of very senior officers – Deputy Commissioners or Assistant Commissioners – which was described in s 51(1)(a). That conclusion is supported by the contrast between s 53(1)(a) and s 53(1)(b), which in turn points to a contrast between s 51 removal and s 181D removal. Section 53(1)(b) itself suggests a contrast between the grounds for s 181D removal in general and a narrow class of grounds resting on misbehaviour.

154 It does not, however, follow from the fact that the assumed power of the Commissioner to recommend removal was wide, that the Commissioner was not obliged to give procedural fairness to the officer who was to be the subject of the recommendation. The procedure – a recommendation by the Commissioner and approval by the Minister, before removal by the Governor in Council – suggested that the matter had a degree of seriousness and complexity. Whether or not the Governor in Council was obliged to act on a recommendation of the Commissioner approved by the Minister without being given any reasoning process to justify this course, the Minister, being responsible to Parliament for his approval, would be unable, as a practical matter, sensibly to approve a proposed removal unless the Commissioner had explained why the approval should be given. That the Commissioner had to go to that trouble as a practical matter points against a construction of the Act as extinguishing an obligation of the Commissioner to give procedural fairness to the officer who is the subject of the recommendation – for example, by stating how it was thought that effectiveness, efficiency and economy in the management of the functions and activities of the Police Service was to be advanced by making it. Very often there might be nothing the notified officer could have said, but that is no reason why the Act should be read as having excluded the opportunity to be heard.

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."[126]

155 Further, it is a matter of ordinary experience that an officer whose appointment is terminated without having been afforded any opportunity to influence the course of events is likely to experience feelings of resentment[127]. Perception of that resentment by former colleagues of the officer would tend to diminish the effective, efficient and economical management of the Police Service.

156 It was submitted that to conclude that s 51 did not exclude procedural fairness would be damaging to the efficiency of the Police Service. Allusions were made to the need to make urgent decisions, and to instances in which providing an officer with the opportunity to be heard would result in the officer not having anything to say, or at least nothing relevant. It is true that the way in

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126 *John v Rees* [1970] Ch 345 at 402 per Megarry J.

127 *John v Rees* [1970] Ch 345 at 402 per Megarry J.

which the duty to give procedural fairness is to be complied with in particular cases may well vary with the circumstances. What is necessary to satisfy procedural fairness where there is no great urgency, or where there is some factual complexity, may be unnecessary in circumstances of great urgency or where the state of affairs is not factually complex. But that does not negate the existence of the duty to give procedural fairness in its entirety.

157 Each party to the appeal contended that the law relating to the dismissal of persons employed by the executive government "at pleasure" was central to their arguments. The applicant submitted that there was no language suggesting that he was employed at pleasure. The respondents pointed to the law about employment at pleasure as important background to the Act. But even if it is important background, the construction of the legislation is clear: it does not exclude procedural fairness. The body of law relating to dismissal at pleasure has no determinative significance in this case and it is unnecessary to decide what its present content is. It is to be left to the cases (cases which are probably now rare and cases of which this is not one) where there is no statutory regulation of the engagement, or where the relevant statute uses language apparently adopting it[128], or the cases where the executive government in terms relies on supposed rights under that body of law, and the parties conduct the proceedings by reference to that reliance[129].

158 The respondents also relied on the words "at any time" in s 51(1). Those words refer only to the power to remove and the time at which removal may be effected, not the procedure by which or the grounds on which a recommendation for removal should be made.

159 It follows that the Act does not exclude the duty of the Commissioner to give procedural fairness in making a s 51 recommendation.

The declarations made by the trial judge

160 It is not necessary to make declarations 1-3: the trial judge's declaration 4 sufficiently encapsulated the ground of the applicant's success. Declaration 5(a) proposed by Callinan J differs from the trial judge's declaration 4 in deleting a reference to the applicant's contract. That reference is desirable because the precise level of his remuneration depended on the contract. Whether or not the contract required procedural fairness, its termination was occasioned only by the

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128 For example the statutory language in *Coutts v The Commonwealth* (1985) 157 CLR 91.

129 For example, *Kelly v Commissioner of Department of Corrective Services* (2001) 52 NSWLR 533 at 539 and 546-548.

invalid removal from office, and therefore the decision to terminate was itself invalid.

161 Accordingly the fourth declaration made by the trial judge should be restored.

Monetary relief

162 Orders 5(b) and (c) proposed by Callinan J should be made for the reasons he gives. Section 53(5) is no bar to the order proposed as par 5(b): it limits compensation only in cases of valid removal from office, not, as here, invalid removal from office.

163 The respondents contended that the Court of Appeal had not dealt with an issue about whether the damages awarded by the trial judge should have been reduced for "vicissitudes", but the ground of appeal to the Court of Appeal said to raise that issue does not do so. The applicant's submission that the matter had not been the subject of evidence or argument at trial was not contradicted by the respondents.

Orders

164 The orders which should be made are orders 1 to 4 and 5(b) and (c) proposed by Callinan J. In place of order 5(a) proposed by Callinan J, the declaration made in par 4 of the trial judge's orders should be made.