HIGH COURT OF AUSTRALIA

HEYDON, CRENNAN, KIEFEL, BELL AND GAGELER JJ

COMMISSIONER OF POLICE APPELLANT

AND

DAVID GRANT EATON & ANOR RESPONDENTS

Commissioner of Police v Eaton
[2013] HCA 2
8 February 2013
S230/2012

ORDER

1. *Appeal allowed.*

2. *Set aside orders (a), (b) and (c) of the Court of Appeal of the Supreme Court of New South Wales made on 6 March 2012 and, in their place, order that the appeal to the Court of Appeal be dismissed.*

3. *Set aside the orders of the Full Bench of the Industrial Relations Commission of New South Wales made on 24 March 2012.*

4. *The appellant pay the first respondent's costs of the proceedings in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

M J Leeming SC with M C L Seck for the appellant (instructed by Bartier Perry)

S Crawshaw SC with P F Lowson and A L Howell for the first respondent (instructed by Walter Madden Jenkins)

Submitting appearance for the second respondent

CATCHWORDS

Commissioner of Police v Eaton

Jurisdiction – Subject matter jurisdiction – Industrial Relations Commission of New South Wales ("IR Commission") – Probationary police officer dismissed by Commissioner of Police under s 80(3) of the *Police Act* 1990 (NSW) – Probationary police officer applied to IR Commission under s 84(1) of the *Industrial Relations Act* 1996 (NSW) claiming dismissal was harsh, unreasonable or unjust – Whether IR Commission has jurisdiction under Pt 6 of Ch 2 of the *Industrial Relations Act* to determine unfair dismissal claim regarding dismissal under s 80(3) of the *Police Act.*

Statutes – Statutory interpretation – Implied repeal – Part 6 of Ch 2 of the *Industrial Relations Act* 1996 (NSW) allows public sector employees to challenge dismissal as harsh, unreasonable or unjust – Section 80(3) of the *Police Act* 1990 (NSW) permits Commissioner of Police to dismiss probationary police officers from the New South Wales Police Force at any time and without reason – Inconsistency and incoherence between provisions of the *Industrial Relations Act* and the *Police Act* – Whether Parliament intended the general provisions of the *Industrial Relations Act* to affect the operation of the earlier specific provisions of the *Police Act.*

Words and phrases – "generalia specialibus non derogant", "harsh, unreasonable or unjust", "implied repeal", "legislative intention", "probationary police officer", "unfair dismissal".

Industrial Relations Act 1996 (NSW), Ch 2 Pt 6, s 84(1).
Police Act 1990 (NSW), Pt 9 Div 1C, ss 80(3), 218.

1 HEYDON J. This is an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales ("the Court of Appeal"). The appellant is the Commissioner of Police ("the Commissioner"). David Grant Eaton ("the first respondent") is a probationary constable whom the Commissioner purportedly dismissed. The second respondent is the Industrial Relations Commission of New South Wales ("the Commission"). The appeal concerns the interrelationship between two statutes. One is the *Industrial Relations Act* 1996 (NSW) ("the IR Act"). The other is the *Police Act* 1990 (NSW) ("the Police Act").

2 Section 84(1) of the IR Act provides: "If an employer dismisses an employee and the employee claims that the dismissal is harsh, unreasonable or unjust, the employee may apply to the Commission for the claim to be dealt with under this Part [ie Ch 2 Pt 6]."

3 Section 80 of the Police Act relevantly provides:

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

4 Section 80 may be compared with another provision in the Police Act, s 181D. The parties correctly agreed that that section does not apply to probationary constables. Section 181D creates a power to remove non-probationary police officers. The s 80(3) power to dismiss probationary constables is much less restricted than the s 181D power to remove non-probationary police officers. Section 181D provides in part:

> "(1) The Commissioner may, by order in writing, remove a police officer from the NSW Police Force if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct.
>
> …
>
> (3) Before making an order under this section, the Commissioner:

(a) must give the police officer a notice setting out the grounds on which the Commissioner does not have confidence in the officer's suitability to continue as a police officer, and

(b) must give the police officer at least 21 days within which to make written submissions to the Commissioner in relation to the proposed action, and

(c) must take into consideration any written submissions received from the police officer during that period.

(4) The order must set out the reasons for which the Commissioner has decided to remove the police officer from the NSW Police Force."

The s 80(3) power of dismissal can be exercised "at any time". The s 181D power of removal can be exercised only after notice has been given, an opportunity to make written submissions has been supplied, and the duty to take them into consideration has been carried out. The s 80(3) power can be exercised "without giving any reason." A notice issued under s 181D must set out the grounds on which the Commissioner proposes to remove the police officer. And if a police officer removed by a s 181D order applies to the Commission for a review of the order under s 181E(1) on the ground that the removal is harsh, unreasonable or unjust, the Commission's first *duty* is to consider those reasons. In contrast, s 88(b) of the IR Act creates only a *power* to consider the reasons for the dismissal of an employee which is the subject of a claim under s 84(1).

The facts

5 On 11 May 2007, the first respondent was appointed as a constable of police on probation in the NSW Police Force. From about April 2008, there were disputes between the first respondent and his superiors about his conduct. On 4 February 2009, Assistant Commissioner Corboy issued a notice foreshadowing the first respondent's dismissal from the Force pursuant to s 80(3) of the Police Act. On 22 July 2009, Assistant Commissioner Corboy, as the delegate of the Commissioner, dismissed the first respondent.

The legal issue

6 It was common ground that the power to dismiss probationary constables under s 80(3) of the Police Act and the power to remove non-probationary officers under s 181D are distinct. The former power cannot be employed in relation to non-probationary officers, and the latter power cannot be employed in relation to probationary constables. It was also common ground that the capacity of a removed non-probationary officer to obtain a review of the removal under s 181E did not apply to a dismissed probationary officer. And it was common ground that a decision to dismiss a probationary constable under s 80(3) is reviewable for jurisdictional error. In the Court of Appeal, that proposition was

incorrectly treated as an answer to the Commissioner's case[1]. But the question is not whether a s 80(3) decision is reviewable in that sense. The question is whether, in addition, a s 80(3) decision can be challenged under s 84(1) of the IR Act. That legal issue arises in the following way.

7 Sections 83 and 84(1) of the IR Act are in Ch 2 Pt 6. Section 83 provides that Pt 6 applies to the dismissal of any public sector employee. The Dictionary of the IR Act provides that "public sector employee" includes a member of the NSW Police Force. A probationary constable is a member of the NSW Police Force. Hence, if ss 83 and 84(1) of the IR Act are read in isolation, dismissed probationary constables would have a right to apply to the Commission for a claim that the dismissal was harsh, unreasonable or unjust to be dealt with under Ch 2 Pt 6 of the IR Act. But does the broad power which s 80(3) of the Police Act affords the Commissioner to dismiss probationary police officers like the first respondent mandate a different conclusion?

The procedural background

8 The first respondent's claim was upheld by the Commission. On appeal by the Commissioner, a Full Bench of the Commission (Walton VP, Marks and Kavanagh JJ) found that the Commission lacked jurisdiction. The first respondent sought judicial review pursuant to s 69 of the *Supreme Court Act* 1970 (NSW). The Court of Appeal quashed the decision and orders of the Full Bench and remitted the matter. The Full Bench then dismissed the Commissioner's appeal. The Commissioner appeals by special leave to this Court.

The outcome

9 The appeal turns on two main issues. One is the interaction between s 80(3) of the Police Act and Ch 2 Pt 6 of the IR Act. The other is the effect of s 218 of the Police Act.

10 The Commissioner's appeal should be allowed. There is no jurisdiction in the Commission under s 84(1) of the IR Act to hear applications by persons dismissed under s 80(3) of the Police Act. That is so for the following four reasons.

The terms of s 80(3)

11 First, the language of s 80(3) points against the conferral of any jurisdiction on the Commission to deal with claims that a s 80(3) dismissal is

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1 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [148].

harsh, unreasonable or unjust within the meaning of s 84(1) of the IR Act. Three key aspects of the language have this effect – "at any time", "without giving any reason" and "probationary".

12 *"At any time".* The words "at any time" point against any examination of whether the selection of a time for dismissal was harsh, unreasonable or unjust. That is because dismissal can take place at any time. If the Police Act gives the Commissioner power to dismiss a probationary constable at any time there is no room for complaint that dismissal should not have taken place at a harsh, unreasonable or unjust time. The words "at any time" did not appear in the precursor to s 80(3), namely r 11(b) of the Police Rules 1977. The words are the same as those in s 9(1) of the *Police Regulation Act* 1958 (Vic), which Gibbs CJ described in 1985 as giving "an unfettered power to dismiss"[2]. The adoption by the New South Wales legislature of those words in 1990 suggests that they bear the meaning given to them by Gibbs CJ.

13 *"Without giving any reason".* The next key expression is "without giving any reason". It is often impossible to assess whether a dismissal was harsh, unreasonable or unjust without examining the reasons for it. And in many instances it is impossible to assess what the reasons for a dismissal were unless the person who made the decision to dismiss states the reasons. The capacity of the Commissioner to dismiss probationary constables "without giving any reason" suggests that there is to be no examination of whatever the Commissioner's reasons were. Hence the light cast by them on the harshness, unreasonableness or injustice of the decision is unavailable. In turn, the harshness, unreasonableness or injustice must be immaterial to the lawfulness of the decision. Review of the dismissal is not available on one of those grounds.

14 The first respondent submitted that the absence of an obligation to give reasons in s 80(3) was not significant. This was because there was no duty at common law to give reasons. But this case does not concern the common law. It concerns statutory construction. The lack of any duty to give reasons affects how the statutory scheme is to be construed. The relevant comparison is not between s 80(3) and the common law. It is between s 80(3) and the duty to give reasons under s 181D(4) of the Police Act. As the Full Bench pointed out, determining whether or not a dismissal from employment is harsh, unreasonable or unjust must involve an examination of the circumstances in which the dismissal occurred, including the reasons for and the timing of the dismissal. And as the Full Bench also pointed out, when an application under s 84(1) of the IR Act is heard, the Commission may, by reason of s 88(a) and (b) of the IR Act, take into account whether a reason was given for the dismissal, and, if so, whether that reason had a basis in fact. This task is difficult to carry out where the

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2 *O'Rourke v Miller* (1985) 156 CLR 342 at 349; [1985] HCA 24.

Commissioner has dismissed a probationary police officer under s 80(3) of the Police Act, for that provision permits dismissal without any reason[3]. The difficulty of carrying out that task suggests that it does not arise in relation to s 80(3) dismissals.

15 *"Probationary".* The third key expression is "probationary". Section 80(2) of the Police Act provides that a person when first appointed as a constable is to be appointed on probation in accordance with the regulations. That is a reference to cll 12-14 of the Police Regulation 2008 (NSW). Clause 12 provides that the duration of the probationary period shall be one year, or such longer or shorter period as the Commissioner may direct, not being less than six months. Clause 13 provides:

> "Confirmation of appointment in the rank of constable is subject to:
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> (a) the successful completion of initial basic training, as determined by the Commissioner, and
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> (b) the completion of the period of probation, and
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> (c) a satisfactory fitness report, and
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> (d) the other requirements of this Division."

Clause 14 provides in part:

> "(1) The appointment of a probationary constable is not to be confirmed unless a police officer designated by the Commissioner has reported that the probationary constable is fit to discharge satisfactorily the duties of constable.
>
> (2) Any such fitness report is to deal with the probationary constable's:
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> (a) medical fitness …, and
>
> (b) aptitude for the discharge of the duties of constable, and
>
> (c) competence, integrity, performance and conduct."

16 There are many occupations which attract the interest of young people but for which some young people turn out to be unsuitable because of some factor not readily identifiable in advance. One of those occupations is the occupation of police officer. Police officers have heavy responsibilities. They sometimes work

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3 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 219 [32] and [34]-[35].

under grave pressures. How satisfactorily particular individuals bear those responsibilities and stand up to those pressures can only be learned by experience. Hence most New South Wales police officers commence their careers by being probationary constables. Probation involves a process of putting to proof. It is a process of investigation and examination. A probationary period is a "period of testing or trial for the purpose of ascertaining whether [a person] has the necessary qualifications for a permanent appointment, and the word 'probation' itself involves the idea of something in the nature of trial and experiment with a view to determining whether an applicant is to be appointed."[4] A probationary constable is one whose qualifications for non-probationary status are put to proof, investigated, examined, tested or tried. Those qualifications include aptitude, competence, integrity, performance and conduct. The probationary status of probationary constables is another factor pointing to the conclusion that s 84(1) of the IR Act does not extend to conferring on probationary constables a right to claim that a dismissal is harsh, unreasonable or unjust.

17 The first respondent submitted that these arguments based on the language of s 80(3) of the Police Act were beside the point. He submitted that the Commission's power to review a dismissal should not be restricted by the nature of the power to dismiss. That is not so. The freedom with which an employer may dismiss can affect the capacity of an employee to challenge the dismissal. If, as Gibbs CJ said, a power to dismiss like s 80(3) of the Police Act is unfettered, then its exercise is necessarily immune from challenge on the ground of harshness, unreasonableness or unfairness.

18 The first respondent also submitted that the power conferred by s 80(3) of the Police Act was similar to the power of dismissal held by employers at common law. That is not so either. At common law, depending on the terms of the contract of employment, there is a duty to give notice or pay damages in lieu.

Remedies under s 89 of the IR Act

19 A second reason for concluding that a dismissal under s 80(3) of the Police Act does not permit the dismissed probationary constable to make an application under s 84(1) of the IR Act stems from the remedies available if a s 84(1) claim is made out. Those remedies include an order for reinstatement under s 89(1) of the IR Act, for re-employment under s 89(2), for payment for lost remuneration under s 89(3), and for continuity of employment under s 89(4). As the Full Bench said, these remedies are "clearly inconsistent" with the Commissioner's powers under s 80(3). Section 80(3) "is clearly indicative of an

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4 *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47 at 49 per Street CJ (Roper CJ in Eq concurring).

authority that reposes in the Commissioner to dismiss a probationary police officer without interference of any kind."[5]

20 For the two reasons given so far, it is necessary to reject the first respondent's submission that there is no inconsistency between s 80(3) of the Police Act and Ch 2 Pt 6 of the IR Act.

The generality of s 84(1) of the IR Act and the particularity of s 80(3) of the Police Act

21 There is a third reason why the Commission has no jurisdiction under s 84(1) of the IR Act to hear applications by persons dismissed under s 80(3) of the Police Act. Section 80(3) of the Police Act deals with the specific and relatively narrow subject of dismissing probationary constables. Section 84(1) of the IR Act deals with the general subject of the remedies open to a broad range of employees dismissed harshly, unreasonably or unjustly. The general provision must give way to the particular provision.

Section 80(3) of the Police Act compared with s 181D of the Police Act

22 Fourthly, the Commissioner's powers under s 80(3) of the Police Act in relation to probationary constables stand in contrast with the Commissioner's powers under s 181D of the Police Act in relation to police officers. Section 181E of the Police Act provides that a non-probationary police officer who is removed from the NSW Police Force by an order under s 181D of the Police Act may apply to the Commission for a "review" of the order on the ground that the removal is harsh, unreasonable or unjust. That is a process which is distinct from the process of having a "claim" dealt with under s 84(1) of the IR Act.

23 In some respects, the process under s 181E for a removed non-probationary police officer is superior to the process under s 84(1) for a dismissed employee. For example, s 181E(3) imposes a duty on the Commissioner to make available to the applicant all the documents and other material on which the Commissioner relied in deciding under s 181D(1) that the Commissioner did not have confidence in the applicant's suitability to continue as a police officer. The Commissioner is subject to no equivalent duty in relation to s 84(1) of the IR Act.

24 In other respects the processes, whether superior or inferior from the point of view of the removed non-probationary police officer or the dismissed employee, are different. Thus s 181F(1) requires the Commission to proceed on

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5 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 219 [36] per Walton VP, Marks and Kavanagh JJ.

a "review" in the following way. First, it must consider the Commissioner's reasons for the decision to remove the non-probationary police officer from the NSW Police Force. Secondly, it must consider the case presented by the applicant for the view that the removal was harsh, unreasonable or unjust. Thirdly, it must consider the case presented by the Commissioner in answer to the applicant's case. This stands in contrast with the procedure in relation to s 84(1) applications. Section 88 of the IR Act provides that the Commission "may, if appropriate", take into account six factors, the last of which is "such other matters as the Commission considers relevant." Liberty not to take account of a relevant matter gives the Commission fluidity. Its role, as the Commissioner submitted, is "very free flowing".

25 If a probationary constable dismissed under s 80(3) of the Police Act could apply to the Commission under s 84(1) of the IR Act, that probationary constable would enjoy a right of review superior to that of a confirmed constable. Indeed, that probationary constable would enjoy a right of review superior to that of any police officer of higher rank. That would, in turn, produce remarkable anomalies.

26 One anomaly is that if dismissed probationary constables could make applications under s 84(1) they would be in a better position than non-probationary officers. The rights of review s 181E gives to the latter in relation to s 181D removals would be more qualified than those s 84(1) gives to the former in relation to s 80(3) dismissals. In proceedings under s 84(1), where the dismissal has taken place because of alleged criminal activity, the employer bears the burden of proving that the crime was committed[6]. But in proceedings under s 181E for review on the ground that removal was harsh, unreasonable or unjust, the applicant bears the burden of proving that the crime was not committed. That is because the applicant has, under s 181F(2), the burden of establishing that the applicant's removal from the NSW Police Force was harsh, unreasonable or unjust. The consequences of s 181F(2) are not narrow or trivial. They are significant in view of the fact that s 201 of the Police Act renders it a criminal offence for a police officer to neglect or refuse to obey any lawful order or carry out any lawful duty as a police officer. The scope for criminal offences by police officers, and for removal because of them, is thus wide.

27 Another anomaly stems from the fact that s 181F(3)(b) of the Police Act operates adversely to the applicant under s 181E reviews. Section 181F(3)(b) provides:

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6 *Wang v Crestell Industries Pty Ltd* (1997) 73 IR 454 at 463.

> "Without limiting the matters to which the Commission is otherwise required or permitted to have regard in making its decision, the Commission must have regard to:
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> …
>
> (b) the public interest (which is taken to include the interest of maintaining the integrity of the NSW Police Force, and the fact that the Commissioner made the order pursuant to section 181D(1))."

This is a reference to the "public interest" in a different sense from the "public interest" referred to in s 146(2) of the IR Act. Section 146(2) requires the Commission to:

> "take into account the public interest in the exercise of its functions and, for that purpose, [the Commission] must have regard to:
>
> (a) the objects of this Act, and
>
> (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy."

The objects of the IR Act are stated in s 3. They are broad, but they relate essentially to industrial relations. The matters referred to in s 181F(3)(b) of the Police Act stand outside s 146(2) of the IR Act. The Commission's duty to have regard to the public interest as defined in s 181F(3)(b) is adverse to the interests of applicants seeking reviews under s 181E of orders made under s 181D. An applicant for a remedy under s 84(1) of the IR Act does not face that obstacle.

28 Another relevant provision is s 181G of the Police Act. Sub-section (1) commences with the words:

> "The provisions of the [IR Act] apply to an application for a review under this Division in the same way as they apply to an application under Part 6 (Unfair dismissals) of Chapter 2 of that Act, subject to this Division and to the following modifications".

Section 181G(1) is significant in two respects. One is that pars (a)-(f) of s 181G(1) apply six provisions of the IR Act in modified form to applications for review by non-probationary police officers. The other is that some of these modifications are adverse to the applicant seeking review under s 181E. For example, s 181G(1)(b) gives the applicant only 14 days within which to apply for review under s 181E, compared to the 21 days within which a claimant under s 84(1) of the IR Act can apply to have a claim dealt with.

29 As the Full Bench said, on the first respondent's construction of the IR Act, probationary constables "effectively [have] greater rights" than non-probationary officers in the above respects[7].

30 The first respondent submitted that the practical consequences of the differences between the beneficial way that probationary constables would be treated on his case when compared to non-probationary police officers are not large. In a sense that may be true. But the differences do reveal a different statutory scheme and structure applying to s 84(1) applicants. That statutory scheme and structure creates a regime which in some respects is less beneficial to s 181E applicants than the Ch 2 Pt 6 scheme is to s 84(1) applicants. In view of the generally fragile position of probationary constables and the more secure position of other police officers, that is a significant anomaly. Probationary constables have relatively slight expectations, for they may not survive the probationary period of testing. Non-probationary police officers have relatively greater expectations, for the simple reason that they are not on probation. On the first respondent's case, those with slight expectations are given better means of protecting them than the means given to those with firmer expectations. The first respondent's construction of s 84(1) of the IR Act, which leads to this outcome, is extremely suspect for that reason. Instead of a coherent and harmonious scheme, it produces a self-contradictory scheme. A statutory scheme by which it is easier for the Commissioner to part with those endeavouring to show themselves fit for non-probationary office than it is for the Commissioner to part with those who once showed themselves fit but may have now become unfit is intelligible. The reverse scheme is not.

31 The first respondent submitted that no provision in the Police Act expressly excluded merits review under Ch 2 Pt 6 of the IR Act by the Commission of a decision to dismiss a probationary police officer. The necessary implications of the two Acts read together, however, have that effect.

Section 218

32 Section 218 of the Police Act provides:

> "(1) The [IR Act] is not affected by anything in this Act.
>
> (2) Subsection (1) does not limit section 44 or 89 or any provision of the [IR Act]."

This is a very difficult section. The parties agreed that the reference in s 218(2) to "89" must in fact be read as a reference to "88". So s 218(2) in effect provides

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7 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 225 [55] per Walton VP, Marks and Kavanagh JJ.

in part that ss 44 and 88 of the Police Act can affect the IR Act. That is not the only problem with s 218. In view of s 218(1), which provides that the Police Act does not affect any provision in the IR Act, it is supererogatory for s 218(2) to provide that s 218(1) of the Police Act does not limit "any provision" of the IR Act. Perhaps more importantly, as the Full Bench correctly held, s 218(1) cannot mean what it says. There are specific provisions in the Police Act apart from s 44 and s 88 that have a direct impact on certain provisions of the IR Act. One example is s 179(1) of the Police Act. It provides:

> "In the application of Part 5 of Chapter 4 of the [IR Act] to proceedings under this Division, the provisions of sections 163, 167, 169(4), 172, 181 and 184 of that Act do not have effect."

As the Full Bench said[8]:

> "In these circumstances, it cannot be said that the [IR] Act is not affected by anything in the [Police Act]. It is clearly affected. It is erroneous to argue that the provisions of s 179 of the [Police Act] have no effect because of the application of s 218 of the [Police] Act."

33 The appellant gave numerous other examples, of which a few may be referred to. Section 181D(7) of the Police Act provides in part:

> "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."

Section 181D(7) goes on to provide that the word "tribunal" includes the Commission. Other examples may be found in the modifications made by s 181G to the provisions of the IR Act in relation to reviews of decisions to remove non-probationary officers from the NSW Police Force.

34 Because of provisions of this kind, the Full Bench reached the following conclusions, correctly, with respect[9]:

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8 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 226 [61] per Walton VP, Marks and Kavanagh JJ.

9 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 226 [62]-[63] per Walton VP, Marks and Kavanagh JJ.

> "Accordingly, s 218 must have some … meaning [other than its apparent meaning]. Its construction must be approached in the same manner adopted by the Court of Appeal in [*Public Service Association (NSW) v Industrial Commission (NSW)*[10]]. That is, positive statements about certain matters will have the necessary effect of negativing the jurisdiction and powers created by the [IR] Act.
>
> We would construe [s 218] as leaving intact the power of the Commission to deal with industrial matters covering police officers unless especially restricted by some provision of the [Police Act]."

35 For the first respondent, s 218 presented no problem. He saw s 218 as giving the IR Act primacy over the Police Act in the event of inconsistency. But he contended that there was no inconsistency. For the reasons given above[11], this denial of inconsistency is not correct. Hence the first respondent's approach to s 218 lacks any foundation.

Section 405(3)

36 The first respondent relied on s 405(3) of the IR Act. Section 405(1)(b) provides:

> "Any award or order of the Commission does not have effect to the extent that it is inconsistent with:
>
> …
>
> (b) a function under the [Police Act] with respect to the discipline, promotion or transfer of a police officer, or with respect to police officers who are hurt on duty."

Section 405(3) provides:

> "This section does not affect any decision of the Commission under Part 6 of Chapter 2 (Unfair dismissals)."

The appellant submitted that s 405 did not bestow unfair dismissal rights and was irrelevant to the appeal. The first respondent submitted:

> "While s 405(3) does not bestow unfair dismissal rights on probationary police officers, it avoids any argument that a decision of the [Commission]

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10 (1985) 1 NSWLR 627.

11 See above at [32]-[34].

> under Pt 6 of Ch 2 is inconsistent with a function under the Police Act with respect to the discipline of a police officer and thus may not be made because of the provisions of s 405(1)."

The reasoning set out above does not rest on any argument of the kind that the first respondent described.

Orders

37 The appeal should be allowed. Orders (a), (b) and (c) made by the Court of Appeal of the Supreme Court of New South Wales on 6 March 2012 should be set aside and in lieu thereof the appeal should be dismissed and the orders made on 24 March 2012 by the Full Bench of the Industrial Relations Commission of New South Wales pursuant to the Court of Appeal's orders should be set aside. In accordance with the terms on which special leave was granted, the appellant is to pay the first respondent's costs in this Court and it should be noted that order (d) made by the Court of Appeal is not disturbed.

38 CRENNAN, KIEFEL AND BELL JJ. The first respondent was attested as a constable on probation on 7 May 2007. He was still a probationary constable, his appointment not having been confirmed, when, on 22 July 2009, a delegate of the appellant, the Commissioner of Police ("the Commissioner"), dismissed him from the New South Wales Police Force[12]. An investigation which preceded his dismissal identified issues arising from the first respondent's concealment from his superiors of information relevant to his ability to cope with his policing workload. In the notice foreshadowing his dismissal, he was advised that his continued employment with the NSW Police Force was "inimical to the standards expected of police officers by the Parliament, the Commissioner and the community." In dismissing the first respondent, the Commissioner's delegate was exercising the power given by s 80(3) of the *Police Act* 1990 (NSW).

39 The first respondent applied to the Industrial Relations Commission of New South Wales ("the IR Commission"), which is the second respondent in this appeal, under s 84(1) of the *Industrial Relations Act* 1996 (NSW) ("the *IR Act*") for a remedy on the basis that his dismissal was harsh, unreasonable or unjust. His claim was upheld and reinstatement ordered[13]. On the appeal brought by the Commissioner, a Full Bench of the IR Commission held that the IR Commission lacked jurisdiction and dismissed the first respondent's application[14]. The first respondent sought judicial review pursuant to s 69 of the *Supreme Court Act* 1970 (NSW). The Court of Appeal quashed the decision of the Full Bench, holding that the IR Commission had jurisdiction, and remitted the matter to the Full Bench of the IR Commission to be determined according to law[15]. By a grant of special leave, the Commissioner appeals to this Court.

The issue

40 The *IR Act* deals with industrial matters affecting employers and employees. The term "employee" is broadly defined[16]. Part 6 of Ch 2 (hereafter "Part 6") of the *IR Act* is titled "Unfair dismissals". It expressly applies to any

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12 Referred to in the *Police Act* 1990 (NSW) and in these reasons as "the NSW Police Force".

13 *David Eaton and Commissioner of Police* [2010] NSWIRComm 1035 at [609].

14 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 224 [52], 227 [67].

15 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [183].

16 *Industrial Relations Act* 1996 (NSW), s 5.

"public sector employee"[17], which term is defined to include a member of the NSW Police Force[18]. Section 84(1) provides:

> "If an employer dismisses an employee and the employee claims that the dismissal is harsh, unreasonable or unjust, the employee may apply to the Commission for the claim to be dealt with under this Part."

On an application under s 84(1), the IR Commission may make orders for reinstatement, re-employment, remuneration or compensation[19].

41 Section 80 of the *Police Act* provides for the appointment, promotion and dismissal of constables. Sub-section (1) provides that the Commissioner may appoint any person of good character, and suitably qualified, as a police officer with the rank of constable. Sub-section (2) provides that, when first appointed, a police officer is to be appointed on probation in accordance with the regulations. Sub-section (3) provides:

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

The Commissioner contends that the express terms of s 80(3) leave no doubt that the power given by s 80(3) is unfettered in respect of both reasons and timing. They are an immediate indication that the exercise of that power is not to be reviewed by reference to the harshness, unreasonableness or unjustness of the decision, which s 84(1) of the *IR Act* would allow.

42 The Commissioner does not contend that a decision to dismiss a probationary constable under s 80(3) is exempt from all review and accepts that it is subject to judicial review. The Commissioner's argument is that the terms of the power to dismiss are incompatible with a decision made pursuant to it being subjected to review by the IR Commission under Pt 6 of the *IR Act*.

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17 *Industrial Relations Act* 1996, s 83(1)(a).

18 *Industrial Relations Act* 1996, s 4, Dictionary. However, Pt 6 does not apply to a person who is an executive officer under Pt 5 of the *Police Act* 1990: *Industrial Relations Act* 1996, s 83(3).

19 *Industrial Relations Act* 1996, s 89.

Approach to construction

43 Some observations may first be made concerning the nature and the objects of the two statutes here in question as relevant to their construction. The *IR Act* is, as previously mentioned, a general statute applying to industrial relations between employers and employees. It may be accepted that, in many respects, it applies to the conditions of employment of police officers. Its objects include the promotion of efficiency and productivity in the economy of the State of New South Wales and provision for the resolution of industrial disputes[20]. The *Police Act* is concerned with the NSW Police Force, which it establishes[21]. Some of its provisions concern the maintenance of the integrity[22] and discipline of the NSW Police Force[23].

44 To these observations it may be added that the *Police Act* was the earlier Act. The *Police Act* was enacted in 1990; the *IR Act* in 1996, although it had predecessors. Some provisions of the *Police Act* relating to review by the IR Commission were introduced consequent upon the coming into effect of Pt 6 of the *IR Act* in 1996[24].

45 Argument on the appeal proceeded upon the basis that the two statutes should be read together[25], in order to determine whether there is any relevant inconsistency in their respective operation. The question of the relationship between the two statutes is one of legislative intention. In *Associated Minerals Consolidated Ltd v Wyong Shire Council*[26], Lord Wilberforce pointed to several possible interpretations where the field of application of two related statutes is

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20 *Industrial Relations Act* 1996, s 3(b), (g).

21 *Police Act* 1990, s 4.

22 A stated value of the NSW Police Force: *Police Act* 1990, s 7.

23 See, for instance, *Police Act* 1990, ss 71, 82G, 97, 207A.

24 The *Industrial Relations Act* 1996 commenced on 2 September 1996; s 181D in Div 1B of Pt 9 of the *Police Act* 1990 commenced on 16 December 1996 and ss 181E-181J in Div 1C of Pt 9 commenced on 27 June 1997.

25 *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 726; [1906] HCA 73; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; [1995] HCA 44.

26 [1975] AC 538 at 553.

different, but where the later statute does not expressly repeal or override the earlier:

> "The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of the pre-existing legislation, so that each may operate within its respective field?"

In the Court of Appeal, Handley AJA concluded, by reference to the above passage, that Pt 6 of the *IR Act* added another layer of legislation to the *Police Act*[27].

46 Lord Wilberforce went on to observe that discussion of these matters commonly involves consideration of the rule of construction[28] which presumes that a later, general enactment is not intended to interfere with an earlier, special provision unless it manifests that intention very clearly. Even so, the question as to the operation of the statutes remains a matter to be gleaned by reference to legislative intention. That intention is to be extracted "from all available indications"[29].

47 In *Ferdinands v Commissioner for Public Employment*[30] ("*Ferdinands*"), an indication of legislative intention was present in the extent to which the *Police Act* 1998 (SA) dealt with the topic of dismissal. That Act dealt exhaustively with the dismissal of police officers and therefore impliedly repealed the earlier *Industrial and Employee Relations Act* 1994 (SA). The legislation in *Ferdinands* differs from that presently under consideration. Nevertheless, statements respecting statutory construction made in that case are relevant to this appeal.

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27 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [45], Bathurst CJ agreeing at [1].

28 Expressed in the maxim "generalia specialibus non derogant".

29 *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553-554.

30 (2006) 225 CLR 130; [2006] HCA 5.

48 In *Ferdinands*, Gummow and Hayne JJ pointed out that inconsistency was at the root of the principle of implied repeal[31]. This is true also where the question is one of possible amendment where a later statute is said to operate upon an earlier statute. However, as their Honours observed, the law presumes that statutes do not contradict one another. The question is not whether one law prevails, but whether that presumption is displaced[32]. Their Honours considered that the two statutes in question in that case could be accommodated by reading into the *Industrial and Employee Relations Act* 1994 the matters that the Police Commissioner of the South Australian Police would take into account in exercising the power of dismissal; but there were other features of the statutes which were also important[33]. Their Honours said that deciding whether the two statutes could not "stand or live together" in the relevant respect "requires the construction of, and close attention to, the particular provisions in question"[34].

49 Before turning to the provisions in question in their statutory context[35], it is necessary to say something about the utility of recourse to the history of the two statutes. In the Court of Appeal, Tobias AJA attempted to chart the course of the two statutes[36], but their histories and any interrelationship between them does not appear to offer any real guidance on the matters in question.

50 It may be said that the Commissioner has long had the power to dismiss or remove police officers. The antecedent provision to s 80(3) was r 11(b) of the Police Rules 1977, made under the *Police Regulation Act* 1899 (NSW), which

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31 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 137-138 [18].

32 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 146 [49].

33 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 148 [54]-[55].

34 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18].

35 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ, 320 per Mason and Wilson JJ; [1981] HCA 26; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

36 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [122]-[127].

provided that a probationary member of the NSW Police Force could be discharged or dismissed by the Commissioner "without any reason being assigned". On the other hand, an unfair dismissal regime has operated in New South Wales since at least 1991[37]. The possibility that it may have operated earlier was addressed in submissions filed subsequent to the hearing of the appeal, but this need not be gone into. Under the *Industrial Relations Act* 1991 (NSW), the regime was expressed to apply "despite … any other Act"[38], but that provision was not re-enacted in the *IR Act* in 1996. The operation of the *IR Act* by reference to the *Police Act* is the subject of express provision, s 218 of the *Police Act*, which will require consideration later in these reasons.

The structure and operation of the *Police Act*

51 The NSW Police Force established by the *Police Act* is comprised principally of the Commissioner, the Senior Executive Service and other police officers[39]. The Senior Executive Service is comprised of executive officers[40]. Aside from those officers and the Commissioner, all other police officers are referred to as non-executive officers[41]. The Commissioner has responsibility for the management and control of the NSW Police Force, subject to the direction of the relevant Minister[42].

52 Non-executive police officers include probationary constables. As the term suggests, such constables are on probation until they are confirmed as officers of the NSW Police Force. In *O'Rourke v Miller*[43], Gibbs CJ said that "probation is a time of testing or trial and a probationer whose conduct, character

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37 The *Industrial Arbitration (Unfair Dismissal) Amendment Act* 1991 (NSW), Sched 1 inserted such a regime into the *Industrial Arbitration Act* 1940 (NSW). The *Industrial Relations Act* 1991 (NSW), s 750(1) repealed the 1940 Act and, by Pt 8 of Ch 3, re-enacted an unfair dismissal regime.

38 *Industrial Relations Act* 1991, s 255(1)(a).

39 *Police Act* 1990, s 5.

40 *Police Act* 1990, ss 32(1) (definition of "executive officer"), 33(1).

41 *Police Act* 1990, ss 62, 63.

42 *Police Act* 1990, s 8(1).

43 (1985) 156 CLR 342 at 350; [1985] HCA 24.

or qualifications fail to meet the test need not be confirmed in the office to which he was provisionally appointed."

53 Clauses 13 and 14 of the Police Regulation 2008[44] deal with the process of confirmation of appointment as a constable. In addition to completion of initial basic training and a period of probation, cl 13 requires a satisfactory fitness report concerning the probationer before an appointment can be confirmed. Amongst the matters which the fitness report is to address pursuant to cl 14 are the probationary constable's integrity and conduct. Integrity is a value of the NSW Police Force; so much is stated in the *Police Act*[45]. It is against this background that ss 80(1) and 80(3) respectively provide that, subject to the Act and its attendant regulations, the Commissioner may appoint a person as a police constable and may dismiss a probationary police constable at any time and without giving any reason.

54 *Jarratt v Commissioner of Police (NSW)*[46] holds that the power of dismissal conferred by s 51(1) of the *Police Act*[47], which is in terms similar to s 80(3), is conditioned upon procedural fairness being afforded. However, procedural fairness does not in every circumstance require the giving of reasons[48]. The terms of s 80(3) – that the Commissioner is not obliged to give any reasons – also have the effect that the validity of a dismissal does not depend upon the existence of any particular cause for dismissal[49].

55 Section 51(1) applies to an executive officer, who may be removed from office "at any time for any or no reason and without notice", by the Governor on the recommendation of the Commissioner, in the case of the removal of a Deputy Commissioner or Assistant Commissioner, and in any other case, by the Commissioner alone. Executive officers are not subject to the application of Pt 6

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44 Made pursuant to *Police Act* 1990, s 219.

45 *Police Act* 1990, s 7.

46 (2005) 224 CLR 44; [2005] HCA 50; see also *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 135 [8], 143 [36], 148 [57].

47 Which was at the time known as the *Police Service Act* 1990 (NSW).

48 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 662-663, 667; [1986] HCA 7.

49 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 55 [22] per Gleeson CJ.

of the *IR Act*. By s 44(2) of the *Police Act*, their employment is not an industrial matter for the purposes of the *IR Act* and by s 44(2A), Pt 6 of the *IR Act* does not apply. The *IR Act* itself confirms that Pt 6 does not apply to an executive officer of the NSW Police Force[50].

56 Part 9 of the *Police Act* is entitled "Management of conduct within NSW Police Force". It provides the Commissioner with powers to make orders respecting police officers, including for their removal, and it permits review of those orders by reference to a process which is adapted from and different in some respects from that which is provided for under Pt 6 of the *IR Act*. It is evident from the terms of Pt 9 of the *Police Act* that it applies to confirmed police officers and not probationary constables. Thus the only statutory mechanism of review which might apply to probationary constables subject to an order of dismissal under s 80(3) is that provided by Pt 6 of the *IR Act*.

57 Section 181D(1) in Div 1B of Pt 9 of the *Police Act* provides that the Commissioner may remove a police officer if the Commissioner does not have confidence in the officer's suitability to continue as a police officer, having regard to the officer's competence, integrity, performance or conduct. By contrast with s 80(3), an order made under s 181D(1), with respect to a confirmed police officer, must set out the reasons for which the Commissioner has decided to remove the police officer from the NSW Police Force[51]. Clearly enough, the provision of reasons is in aid of the review that is permitted. By s 181E(1), a police officer who is removed from the NSW Police Force under s 181D may apply to the IR Commission for a review of the order on the ground that the removal is harsh, unreasonable or unjust.

58 Division 1 of Pt 9 also provides that the Commissioner may take action with respect to a police officer's misconduct or unsatisfactory performance by ordering, inter alia, a reduction in the police officer's rank, grade or seniority; an action other than dismissal[52]. Certain actions ordered by the Commissioner are subject to review under s 174(1), which provides that a police officer may apply to the IR Commission for a review of the order, on the ground that it is beyond power or is harsh, unreasonable or unjust.

59 Proceedings on applications for review under s 181E(1) are subject to detailed provisions in Div 1C of Pt 9 of the *Police Act*, which are expressed so as

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50 *Industrial Relations Act* 1996, s 83(3).

51 *Police Act* 1990, s 181D(4).

52 *Police Act* 1990, s 173(2).

to omit or modify, directly or indirectly, provisions of the *IR Act* which would otherwise govern the process by which a claim of unfair dismissal is determined. Similar changes are effected to the process which is to attend applications under s 174(1). The provisions of Div 1C respecting the review process are self-contained and reference to the *IR Act* is not necessary. The *Police Act* makes it clear that the *IR Act* is not to apply to these applications. Section 181D(7) provides that, except as provided by Div 1C, no tribunal has jurisdiction or power to review or consider any decision or order of the Commissioner under s 181D and no appeal lies to any tribunal in connection with any such decision or order. "[T]ribunal" is defined to include the IR Commission.

60 It will be necessary at a later point in these reasons to identify some of the more substantial changes effected by the *Police Act* to the review process that is to be undertaken by the IR Commission with respect to claims of unfair dismissal brought by police officers, and to compare that process with the processes under the *IR Act*. At this point it is convenient to turn to the provisions of the *IR Act* respecting the application of Pt 6 and the matters relevant to determinations of claims of unfair dismissal.

Part 6 of the *IR Act*

61 Section 83(1)(a) in Pt 6 of the *IR Act*, by its terms and the definition of a public sector employee, is apt to apply to police officers. Section 83(3) restricts the application of Pt 6 to non-executive police officers, which term includes probationary constables.

62 Section 83(2)(b) of the *IR Act* provides that regulations made under the Act can exempt employees who are serving a period of probation or a qualifying period. However, the relevant regulation[53] exempts only a class of employees who are serving a probationary or qualifying period, the duration of which is determined in advance. Probationary constables under the *Police Act* do not come within the regulation. Clause 12(1) of the Police Regulation 2008 provides that the Commissioner may determine the period of probation. In *Ferraris v Commissioner of Police*[54], the Full Bench of the IR Commission held that the effect of a similar clause was that the Commissioner could increase the period of probation at any time. It follows that the requirement of the regulation cannot be met.

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53 Industrial Relations (General) Regulation 2001 (NSW), cl 6(1)(c).

54 [2006] NSWIRComm 243 at [51].

63 On an application under s 84(1), the IR Commission may make an order for reinstatement, re-employment, remuneration or compensation[55]. It may do so if it is satisfied that the dismissal was harsh, unreasonable or unjust. In so determining, the IR Commission may have regard to the conduct of the employee and whether the employer acted reasonably in all the circumstances, as the Full Bench in this case observed[56]. A general provision for an enquiry into the reasonableness of the conduct of an employer might not be thought suitable to a decision of the Commissioner to dismiss a police officer on the basis of misconduct. Further, as the Full Bench observed in this case, the relief which may be provided by the IR Commission is at odds with the prima facie right of the Commissioner under s 80(3) to dismiss[57].

64 There are other matters which the IR Commission may take into account under s 88 of the *IR Act* in connection with a claim for unfair dismissal. They include, most relevantly, whether a reason for the dismissal was given and, if so, its nature and its substance[58]. The fact that reasons were given, or not, may be relevant to an assessment of the reasonableness of the employer. It will be recalled that s 80(3) of the *Police Act* does not oblige the Commissioner to give reasons. The IR Commission may also take into account whether a warning of unsatisfactory performance was given[59] and whether or not the applicant requested reinstatement[60]. A warning may not be practicable where issues of the integrity of a police officer are involved. By its nature, s 80(3) would not permit a request for reinstatement.

65 Of course, these are matters which may or may not be taken into account as relevant by the IR Commission to a case before it. But they serve to highlight the fact that the unfair dismissal regime of the *IR Act* was not framed with something like the Police Force in mind. It is a general statute. And they raise the question of how, and by reference to what matters, the IR Commission would approach the task of reviewing a dismissal by the Commissioner under s 80(3).

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55 *Industrial Relations Act* 1996, s 89.

56 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 219 [34].

57 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 219-220 [36].

58 *Industrial Relations Act* 1996, ss 88(a), 88(b).

59 *Industrial Relations Act* 1996, s 88(c).

60 *Industrial Relations Act* 1996, s 88(e).

Unfair dismissal claims – the *Police Act*

66 Consideration was given in Pt 9 of the *Police Act* to the means by which claims of unfair dismissal made by confirmed police officers are to be determined by the IR Commission. It was evidently not considered appropriate to apply the processes provided in the *IR Act* which apply to claims of unfair dismissal under that Act. In what follows, attention is directed to the provisions of Div 1C of Pt 9 of the *Police Act*, which concern applications under s 181E(1) respecting orders for removal made by the Commissioner. It is not necessary to survey the processes in Div 1A of Pt 9, concerning applications under s 174(1).

67 The Court of Appeal does not appear to have given any weight to the changes to the unfair dismissal regime brought about by the operation of Div 1C. The Full Bench, however, detailed some of the provisions of Div 1C, commented upon the limitation of IR Commission procedures they effected[61], and concluded that if a probationary constable were able to pursue a claim under Pt 6 of the *IR Act*, he or she would have greater procedural rights than a confirmed officer would have[62]. In these observations the Full Bench was plainly correct.

68 It may first be observed that, under the *IR Act*, the IR Commission has power to order an employer not to dismiss an employee where a threat to do so has been made[63]. The *Police Act* provides that an application under s 181E does not effect a stay of the operation of an order for removal of a police officer[64]. There are also differences regarding the bringing of applications. The *Police Act* excludes the ability of the IR Commission to accept an application made out of time[65]. The *Police Act* requires a hearing to be commenced within four weeks of an application being made under s 181E[66]. No such strictures are placed on the IR Commission under the *IR Act*[67].

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61 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 223-224 [48].

62 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 225 [55].

63 *Industrial Relations Act* 1996, s 89(7).

64 *Police Act* 1990, s 181E(2).

65 *Police Act* 1990, s 181G(1)(b)(ii); contrast *Industrial Relations Act* 1996, s 85(3).

66 *Police Act* 1990, s 181G(1)(e).

67 *Industrial Relations Act* 1996, s 162(2)(a).

69 A claimant under s 181E of the *Police Act* bears the onus of proving that a dismissal was harsh, unreasonable or unjust[68]. There is no equivalent provision in the *IR Act*, which in general terms empowers the IR Commission to determine its own procedures[69]. In the Court of Appeal, Tobias AJA observed[70] that in practice the IR Commission usually places the onus of proof on the applicant for relief, although the Full Bench has held that the employer must establish misconduct, where this is alleged in a case of dismissal. Dismissals under s 80(3) of the *Police Act* may well involve questions of integrity and misconduct.

70 There are two provisions in Div 1C of Pt 9 of the *Police Act* which are significant for the focus which they bring to bear upon the IR Commission's decision, a focus which is not possible under the *IR Act* regime. The first provision requires the IR Commission to consider the material relating to an unfair dismissal claim in a particular order, commencing with the Commissioner's reasons[71]. The second provision requires the IR Commission to consider the "public interest"[72]. The *IR Act* has as its objects matters of public interest, such as the promotion of efficiency and productivity in the New South Wales economy[73]. Section 146(2) requires the IR Commission to take into account the public interest in the exercise of its functions and, for that purpose, to have regard to the objects of the *IR Act*, and the state of the economy of New South Wales and the likely effect of its decisions on that economy. The matters of public interest to which the *Police Act* directs attention are different. The *Police Act* requires, for the purposes of Div 1C of Pt 9, that the public interest be taken to include maintaining the integrity of the NSW Police Force and the fact that the Commissioner made an order for removal.

71 Matters pertaining to evidence are touched upon in the *Police Act*. New evidence cannot be admitted before the IR Commission in review proceedings

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68 *Police Act* 1990, s 181F(2).

69 *Industrial Relations Act* 1996, s 162(1).

70 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [150]-[152], referring to *Wang v Crestell Industries Pty Ltd* (1997) 73 IR 454 at 463-464.

71 *Police Act* 1990, s 181F(1).

72 *Police Act* 1990, s 181F(3)(b).

73 *Industrial Relations Act* 1996, s 3(b).

under Div 1C, except upon notice and by leave[74]. Under the *IR Act*[75], the IR Commission may compel the attendance of witnesses. But under Div 1C of Pt 9 of the *Police Act*, neither the Commissioner, nor any member of the Commissioner's Advisory Panel, is a compellable witness without leave of the IR Commission, which can be granted only if extraordinary grounds exist[76].

Presumption of non-contradiction displaced?

72 The indications in the *Police Act* point towards a legislative intention that a decision made under s 80(3) to dismiss a probationary constable is not to be subject to merits review by the IR Commission under Pt 6 of the *IR Act*.

73 The starting point is the terms of s 80(3) in the context of the status of a probationary constable and the responsibilities vested in the Commissioner. A probationary constable is seeking to achieve confirmation. During this period, the probationary constable's conduct is monitored and subject to report, so that the Commissioner may determine whether the person is suitable for the role of a police officer within the NSW Police Force. The position of a probationary constable may be contrasted with that of a police officer who has achieved confirmation and whose history in the Police Force may need to be taken into account by way of review of a dismissal.

74 The terms of s 80(3), as the Commissioner argues, are strongly suggestive of an unfettered power to dismiss. The fact that the Commissioner is not obliged to give any reasons, whilst not conclusive of an intention that there be no merits review of a decision to dismiss, implies an unfettered power. It stands in contrast with the requirement for reasons, imposed by Pt 9 of the *Police Act*, where a confirmed police officer is dismissed.

75 The lack of a requirement for reasons also points to some incoherence with the provisions of Pt 6 of the *IR Act* concerning the matters to be taken into account by the IR Commission in determining whether a dismissal is harsh, unreasonable or unjust. The terms of s 80(3) suggest that such considerations are not to be in question. The intended legal effect of the Commissioner not being required to give reasons is that the Commissioner's decision cannot be impugned on account of any particular reason.

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74 *Police Act* 1990, s 181G(1)(f).

75 *Industrial Relations Act* 1996, s 164(1)(a).

76 *Police Act* 1990, s 181H.

76 The regime provided for in Pt 9 of the *Police Act* for the claims of confirmed police officers evidences a concern that the processes of Pt 6 of the *IR Act* are not in all respects appropriate to be applied to decisions of the Commissioner to dismiss or make other like orders. Part 9 maintains a focus on the Commissioner's decision, a focus which is not provided by the general provisions of the *IR Act*. Part 9 elevates the Commissioner's decision to one of public interest, in the context of the maintenance of the integrity and discipline of the NSW Police Force. The placing of the burden of proof upon the police officer dismissed is consistent with the weight to be given to the Commissioner's decision, as is the provision which prevents a review of that decision by reference to additional material.

77 These are not insignificant matters. They raise important questions concerning the interaction between Pt 6 of the *IR Act* and the *Police Act* and as to the internal consistency of the *Police Act*. If Pt 6 applied to probationary constables, confirmed police officers' claims of unfair dismissal would be dealt with under the particular provisions of Pt 9 of the *Police Act*, while probationary constables' claims would be dealt with under the general provisions of the *IR Act*, which were not considered by the legislature in enacting the *Police Act* to be suited to the same topic. An anomalous position would result whereby probationary constables would enjoy greater procedural rights than confirmed police officers, as the Full Bench correctly observed[77].

78 In accordance with ordinary rules of construction concerning the internal operation of a statute, the *Police Act* should be construed in a way which best achieves a harmonious result[78]. The same principle of consistency informs the construction of two statutes which may share a field of operation.

79 It was pointed out by the Court of Appeal that s 80(3) could have been excluded by a regulation made under s 83(2) of the *IR Act*, and that the Parliament had given its attention to the relationship between the *Police Act* and the *IR Act* (or its predecessors) in successive industrial relations statutes without expressly excluding probationary constables from the unfair dismissal regime in the industrial relations statutes[79]. Provision could also have been made in the *Police Act* to exclude probationary constables from the operation of Pt 6 of the

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77 See [67].

78 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

79 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [28]-[29], [35].

IR Act, as was done with respect to executive officers[80]. So much may be accepted. It may be that a conscious decision was made not to exclude probationary constables, as the reasons of the Court of Appeal imply. It may also be observed that the terms of s 80(3) have never been substantively altered. They may have been thought to be a sufficient indicator that review by the IR Commission was not intended. These are matters of speculation. No proper inferences helpful to the process of construction are available.

80 Mention was also made in the Court of Appeal[81] of s 405 of the *IR Act*, which provided at the relevant time and in relevant part:

> "**Statutory provisions relating to public sector employees**
>
> (1) Any award or order of the Commission does not have effect to the extent that it is inconsistent with:
>
> …
>
> (b) a function under the *Police Service Act 1990* with respect to the discipline, promotion or transfer of a police officer …
>
> (3) This section does not affect any decision of the Commission under Part 6 of Chapter 2 (Unfair dismissals)."

81 Whilst the *IR Act* has application to other industrial matters involving police officers, as discussed earlier in these reasons[82], by operation of s 405(1)(b) the IR Commission cannot, by its orders, interfere with matters of discipline, which are dealt with under the *Police Act*. Insofar as an order made on an unfair dismissal claim might be said to cut across disciplinary functions, sub-s (3) confirms that a decision made under Pt 6 of the *IR Act* is unaffected. In that sense Pt 6 may prevail to the extent of any inconsistency, as Handley AJA observed. However, the provision assumes that the decision is made within the jurisdiction of the IR Commission pursuant to the power given by Pt 6. It is not helpful in answering the question whether Pt 6 applies to a probationary constable.

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80 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [30]-[31].

81 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [33].

82 At [43].

82 Handley AJA also considered that s 218 of the *Police Act* has the effect that, in the absence of an appropriate exemption by regulation, the unfair dismissal regime of the *IR Act* applies to probationary constables[83]. Section 218 of the *Police Act* is troublesome. It was regarded by the Court of Appeal as possibly determinative of the question whether s 80(3) of the *Police Act* affects the application of the *IR Act*'s unfair dismissal regime, at least if read literally[84]. There is a difficulty with doing so, as will be explained.

83 Section 218 of the *Police Act* provides:

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

The predecessor to s 218 was s 117 of the *Police Act*, as enacted. At that time the statute in force dealing with industrial matters in New South Wales was the *Industrial Arbitration Act* 1940 (NSW). The reference in s 117(1) to the *Industrial Arbitration Act* 1940 not being "affected by anything in this Act" may have been explicable on the basis that it made plain that the *Police Act* did not, in any relevant respect, repeal the 1940 Act. The words "is not affected by" were apt to preserve the 1940 Act[85].

84 Section 117 was subsequently amended in 1993 to refer to the *Industrial Relations Act* 1991 (NSW), when it was renumbered s 218[86]. It was again amended in 1997 to refer to the *IR Act*[87], at around the same time amendments were made to insert Div 1B[88] and Div 1C[89] of Pt 9 into the *Police Act*. It appears

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83 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [46].

84 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [27], [46] per Handley AJA (Bathurst CJ agreeing), [182] per Tobias AJA.

85 *Walsh v Law Society (NSW)* (1999) 198 CLR 73 at 93-94 [59]; [1999] HCA 33.

86 *Police Service (Complaints, Discipline and Appeals) Amendment Act* 1993 (NSW), Sched 3, items (5), (10).

87 *Statute Law (Miscellaneous Provisions) Act (No 2)* 1996 (NSW), Sched 4.40 [1].

88 *Police Legislation Further Amendment Act* 1996 (NSW), Sched 1 [60].

to have been updated at these points in time by reference to the industrial relations statutes then in force, but apparently without consideration having been given to its new context and its continuing purpose.

85 This lack of consideration is evident from the terminology of the provision, which has remained unchanged. As enacted, s 117(2) referred to ss 44 and 89 of the *Police Act*. As enacted, s 44(2) relevantly provided that the employment of an executive officer was not an industrial matter for the purposes of the *Industrial Arbitration Act* 1940. Section 89(1) provided that the appointment of or failure to appoint a person to the position of administrative officer was not an industrial matter for the purposes of the 1940 Act. Thus, by s 117(2), s 44 continued to operate to exclude executive officers altogether from the *IR Act* and s 89 continued to make some exclusion with respect to administrative officers.

86 Section 44(2) remains in the *Police Act*. However, s 89 was repealed in 2006 and re-enacted as s 88[90], which is in substantially the same terms. Resort is necessary to s 68(3) of the *Interpretation Act* 1987 (NSW) so that the reference to s 89 in s 218(2) can be read as a reference to s 88.

87 More significantly, sub-s (1) of s 218 is now patently erroneous. The *IR Act* is affected by Pt 9 of the *Police Act*, as has been pointed out. Part 6 of the *IR Act* does not automatically apply to claims by police officers for unfair dismissal. Section 181E in Pt 9 of the *Police Act* permits the making of such a claim, but with the modified processes which Pt 9 provides. Another example of a provision of the *Police Act* which affects the *IR Act* is s 179(1), which particularises certain provisions of the *IR Act* which do not have effect, as the Full Bench observed[91].

88 The Court of Appeal's interpretation of s 218(2) assumes that it operates so that unless expressly provided by the *Police Act*, the *IR Act* is to apply. The terms of s 218(2), and the omission of such words, do not readily lend themselves to this construction. Even if one were to proceed from that assumption, the general provision of s 218 would yield to what is implied by s 80(3) of the *Police Act*.

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89 *Police Service Amendment Act* 1997 (NSW), Sched 1 [4].

90 *Police Amendment (Police Promotions) Act* 2006 (NSW), Sched 1 [5].

91 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 226 [61].

89 It was pointed out in *Rose v Hvric*[92] that the word "expressly" only emphasises the generality of such a provision. It makes clear that no case is outside the provision unless that is the necessary result of the operation of another enactment according to the intention that it manifests[93]. It follows that an implication of inconsistency with the general provision will suffice to oust its application. Such an implication arises where the other provision concerned can be seen to mean more than it actually says; it may be contrasted with an inference[94].

90 The provisions of Pt 9 of the *Police Act* provide an example of inconsistency with provisions of the *IR Act* relating to unfair dismissal. The level of inconsistency is such that s 218(1) does not operate in its terms. Section 80(3) is impliedly inconsistent with s 218. It conveys more than that the Commissioner may dismiss without giving reasons. It implies an unfettered power and therefore that the decision is not to be subjected to a review on the merits. That implication is supported by other aspects of the construction of the *Police Act*, to which reference has been made. Thus if the general jurisdiction of the *IR Act* is recognised by s 218, it is withdrawn by s 80(3)[95] insofar as decisions under that provision are concerned.

91 The conclusion reached by the Full Bench is, with respect, correct. The Full Bench construed s 218 as leaving intact the power of the IR Commission to deal with industrial matters concerning police officers, unless especially restricted by a provision of the *Police Act*[96].

Conclusion and orders

92 The *IR Act* may apply generally to the *Police Act*, but not where the operation of the former produces an internal inconsistency in the latter. Such an effect, which would be reached if a decision under s 80(3) of the *Police Act* were

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92 (1963) 108 CLR 353 at 358; [1963] HCA 13.

93 *Rose v Hvric* (1963) 108 CLR 353 at 358; see also *Public Service Association of New South Wales v Industrial Commission of New South Wales* (1985) 1 NSWLR 627 at 634 per Street CJ.

94 *Rose v Hvric* (1963) 108 CLR 353 at 358.

95 *Public Service Association of New South Wales v Industrial Commission of New South Wales* (1985) 1 NSWLR 627 at 635.

96 *Commissioner of Police v Eaton* (2011) 207 IR 209 at 226 [63].

subject to review under Pt 6 of the *IR Act*, cannot be taken as intended. The conclusion reached concerning the non-application of Pt 6 of the *IR Act* to a decision made under s 80(3) may further be tested by reference to s 218 of the *Police Act* and the rule of construction mentioned at the outset of these reasons[97]. In each case, the general provisions of the *IR Act* do not apply in the face of the special, and inconsistent, terms of s 80(3) of the *Police Act*.

93 The appeal should be allowed and the orders proposed by Heydon J made.

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97 At [46].

94 GAGELER J. The question in this appeal is whether Pt 6 of Ch 2 of the *Industrial Relations Act* 1996 (NSW) ("the IR Act") applies to the dismissal by the Commissioner of Police of a probationary police officer under s 80(3) of the *Police Act* 1990 (NSW) ("the Police Act"). The Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ, Handley and Tobias AJJA) concluded unanimously that it does[98]. I agree with that conclusion and would dismiss the appeal.

Principles

95 The question is wholly one of statutory construction: to be determined through the attribution of legal meaning – and consequently legal operation – to the text of the two statutes in a context which includes their mutual referencing and the history of their amendment.

96 The resolution of the question is guided by common law principles which reflect and inform conventional legislative practice and thereby form part of the "rules of interpretation accepted by all arms of government in the system of representative democracy"[99].

97 One principle (reflecting an approach to legislative drafting of very long standing) is that the text of a statute is ordinarily to be read as speaking continuously in the present[100]. A corollary of that principle is that, where a statute is amended, the statute and the amending statute are "to be read together as a combined statement of the will of the legislature"[101]. Another principle (reflecting at root no more than a convention of language) is that the legal meaning of a statutory text ordinarily corresponds with the textual meaning most appropriate to its context[102].

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98 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30.

99 *Zheng v Cai* (2009) 239 CLR 446 at 456 [28]; [2009] HCA 52 quoted in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 [43]; [2011] HCA 10.

100 *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 986 [104]; 190 ALR 601 at 626-627; [2002] HCA 30; *R v Ireland* [1998] AC 147 at 158. See eg *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148 at 174; [1915] HCA 39; *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 325 at 337-338 [9]; [2003] HCA 65.

101 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; [1995] HCA 44.

102 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]; [1998] HCA 28 quoted in *Australian Securities and Investments*

(Footnote continues on next page)

98 The particular question of statutory construction in the appeal attracts a further and more specific common law principle of construction. Stated at its highest level of generality, it is that statutory texts enacted by the same legislature are to be construed so far as possible to operate in harmony and not in conflict. That principle of harmonious construction applies to the construction of provisions within different statutes of the same legislature to create "a very strong presumption that the … legislature did not intend to contradict itself, but intended that both … should operate"[103]. The principle applies also to the construction of multiple provisions within a single statute to the effect that "[w]here conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions"[104]. In undertaking that adjustment, "such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent"[105].

99 Application of the principle of harmonious construction to the construction of provisions within different statutes can be difficult where a legislature does not "state an intention either that the two statutory regimes

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Commission v DB Management Pty Ltd (2000) 199 CLR 321 at 338 [34]; [2000] HCA 7; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

103 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276; [1961] HCA 32 cited in *Saraswati v The Queen* (1991) 172 CLR 1 at 17; [1991] HCA 21. See also *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 133-134 [4], 138 [18]; [2006] HCA 5.

104 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70]. See also *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 626-627; [1939] HCA 40; *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 617; [1945] HCA 53.

105 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] quoting *The Commonwealth v Baume* (1905) 2 CLR 405 at 414; [1905] HCA 11. See also *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1391 [41], 1412-1413 [172], 1464 [450]; 292 ALR 243 at 259, 289-290, 360; [2012] HCA 46.

should both apply ... or that [one] regime should apply to the exclusion of the [other]"[106].

100 Application of the principle of harmonious construction to the construction of provisions within different statutes is much more straightforward where it is the stated intention of the legislature that the two statutory regimes should both apply. The two statutory regimes might be "so plainly repugnant" that "effect cannot be given to both at the same time"[107]. The result produced by giving effect to the statement of intention might be so improbable or inconvenient in light of a policy inhering in one or other of the statutory regimes as to require the statement of intention to be read as implicitly qualified in a way that conforms to that policy[108]. But if that is not so, the stated intention of the legislature is the beginning and end of the matter[109]. Both statutory regimes apply.

Application

101 Applied to the construction of the IR Act and the Police Act, the first two of those common law principles of construction operate to satisfy the third.

102 The detail of the IR Act and the Police Act is sufficiently set out in reasons for judgment of the majority. Only the critical provisions are usefully repeated. Although frequent amendments have left them untidy, the IR Act and the Police Act are for relevant purposes consistent and mutually reinforcing.

103 Part 6 of Ch 2 of the IR Act is expressed in terms that make it applicable to the dismissal of a probationary constable under the Police Act. The Part is expressed to apply to the "dismissal" of "any public sector employee"[110]. The expression "public sector employee" is defined to include "a member of … the

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106 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 134 [4].

107 *Kutner v Phillips* [1891] 2 QB 267 at 272 quoted in part in *Rose v Hvric* (1963) 108 CLR 353 at 360; [1963] HCA 13.

108 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321; [1981] HCA 26; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

109 *Rose v Hvric* (1963) 108 CLR 353 at 358. See also *Public Service Association of New South Wales v Industrial Commission of New South Wales* (1985) 1 NSWLR 627 at 645.

110 Section 83(1).

NSW Police Force"[111]. The term "dismissal" is defined to include, in the case of a public sector employee, "dispensing with the services of the employee, dismissing the employee as a consequence of disciplinary proceedings against, or the commission of an offence by, the employee or annulling the appointment of the employee"[112]. The Part is expressed not to apply to an employee within a class of "employees serving a period of probation" if exempted from the Part by regulation[113]. The Part is also expressed not to apply to an employee who is an executive officer to whom Pt 5 of the Police Act applies[114]. The net effect is that (in the absence of a regulation excluding the application of the Part to them and save only to the extent that it might be displaced by something in the Police Act) Pt 6 of Ch 2 of the IR Act on its face applies to the dismissal of probationary members of the NSW Police Force including where dismissal occurs as a consequence of disciplinary proceedings or the commission of an offence.

104 The Police Act is in turn expressed not to affect anything in the IR Act. Critically, the Police Act expressly provides that "[t]he [IR Act] is not affected by anything in this Act"[115]. The Court of Appeal was right to treat that statement as determinative of the conclusion that there is nothing in the Police Act that displaces the operation of the provisions of the IR Act that are themselves expressed to make Pt 6 of Ch 2 of that Act applicable to the dismissal of a probationary police officer[116]. The arguments of the Commissioner in the appeal that the statement is either "spent" or "cannot mean what it says" should be rejected. The statement is expressed continuously in the present. It is addressed to the ongoing relationship between the IR Act and the Police Act. Its unqualified declaration is that the IR Act is not affected by anything in the Police Act. The statement must be qualified as a matter of construction to render it harmonious with other provisions of the IR Act: it is expressly qualified by the immediately following statement that it "does not limit" specified provisions of the Police Act or any provision of the IR Act[117]; and it is impliedly qualified by other provisions of the Police Act which are not so specified but which

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111 Section 4, Dictionary.

112 Section 83(5)(b).

113 Section 83(2)(b).

114 Section 83(3).

115 Section 218(1) of the Police Act.

116 *Eaton v Industrial Relations Commission of New South Wales* [2012] NSWCA 30 at [1], [46], [177]-[182].

117 Section 218(2) of the Police Act.

themselves operate to the exclusion of the IR Act[118]. The qualification is in each case by way of exception to the generality of the statement: each exception narrows the scope of the statement to the extent of the ground covered by that exception. Outside those exceptions, the meaning and legal effect of the statement is that no provision of the Police Act is to be construed as operating to alter the legal operation of any provision of the IR Act.

105 The express statement that the IR Act is not affected by anything in the Police Act obviously could not prevail were the power of the Commissioner to dismiss a probationary police officer under the Police Act so plainly repugnant to the jurisdiction of the Industrial Relations Commission of New South Wales under Pt 6 of Ch 2 of the IR Act to conciliate or determine a claim that the dismissal is harsh, unreasonable or unjust that effect could not be given to both at the same time. There is nothing in the nature of the power conferred on the Commissioner by the Police Act to dismiss a probationary police officer at any time and without the necessity for giving a reason that renders an exercise of that power incapable of independent assessment by the Commission under Pt 6 of Ch 2 of the IR Act to determine whether it is harsh, unreasonable or unjust or that is inconsistent with the ability of the Commission to order reinstatement if the Commission finds that standard to be breached. The respective powers of the Commissioner and the Commission can each be given their full legal operation. The role of the Commissioner is to decide whether or not to exercise the power to dismiss and to do so, for the most part, unconstrained by legal limitations breach of which would render a purported exercise of power to dismiss invalid. The role of the Commission is to assess the decision actually made by the Commissioner by reference to the standard of harshness, unjustness or unreasonableness. The role of the Commission is not to stand in the shoes of the Commissioner so as to re-exercise the power to decide whether or not to dismiss. Nor is the role of the Commission to enforce express or implied limitations on the power to dismiss. The requirement of Pt 6 of Ch 2 of the IR Act that the Commission, "if appropriate", take into account factors which include "whether a reason for the dismissal was given to the applicant" in assessing whether a dismissal was harsh, unreasonable or unjust[119] presupposes neither that those factors will always exist nor that their presence or absence will always be appropriate to be taken into account. The general requirement of the IR Act that the Commission take the "public interest" into account in the exercise of all of its functions[120] is sufficient to oblige the Commission in conciliating or determining a claim by a dismissed member of the NSW Police Force to take account of the public interest inherent

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118 Sections 173(9) and 181D(7) of the Police Act.

119 Section 88(a) of the IR Act.

120 Section 146(2) of the IR Act.

in the purpose of the Police Act to establish and maintain "an hierarchical and disciplined force"[121].

106 Nor is the subjection of a decision of the Commissioner to dismiss a probationary police officer to independent assessment by the Commission so improbable or inconvenient in light of a policy inhering in one or other of the Police Act or the IR Act as to call the textual meaning into question. Views may well differ as to whether independent assessment of decisions of the Commissioner by reference to the standard of harshness, unreasonableness or unjustness impedes or enhances the discipline and integrity of the NSW Police Force. It is no part of the process of construction to choose between those differing views. Divisions 1A and 1C of Pt 9 of the Police Act manifest a contemporary legislative judgment that independent assessment of decisions of the Commissioner concerning the discipline and dismissal of permanent members of the NSW Police Force by reference to that standard is both possible and appropriate. Those Divisions, in tailoring the procedures set out in Pt 6 of Ch 2 of the IR Act to the discipline and dismissal of permanent members of the NSW Police Force, do nothing to demonstrate improbability or inconvenience in the generic provisions of that Part of the IR Act applying to the dismissal of probationary police officers. They cannot be read as manifesting by implication a legislative choice that the dismissal of probationary police officers is to be wholly excluded from the jurisdiction of the Commission. They do not by implication create another exception to the statement in the Police Act that the IR Act is not affected by anything in that Act. They do not by implication contradict the provisions of Pt 6 of Ch 2 of the IR Act by which the dismissal of probationary police officers is expressly included in that jurisdiction, subject to exclusion by regulation made under the IR Act.

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121 *New South Wales v Fahy* (2007) 232 CLR 486 at 495 [21]; [2007] HCA 20.