

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND STEWARD JJ

NSW COMMISSIONER OF POLICE

APPELLANT

AND

TREVOR COTTLE & ANOR

RESPONDENTS

NSW Commissioner of Police v Cottle
[2022] HCA 7
Date of Hearing: 3 November 2021
Date of Judgment: 16 March 2022
S56/2021

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J K Kirk SC with M C L Seck for the appellant (instructed by Kingston Reid)

R J de Meyrick for the first respondent (instructed by Brazel Moore Lawyers)

Submitting appearance for the second respondent

Police Association of New South Wales intervening, limited to written submissions

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

NSW Commissioner of Police v Cottle

Industrial law (NSW) – Jurisdiction – Unfair dismissal – Industrial Relations Commission of New South Wales ("IR Commission") – Where first respondent had been retired as non-executive police officer by NSW Commissioner of Police ("Police Commissioner") under s 72A of *Police Act 1990* (NSW) on medical grounds – Where dismissal claimed by first respondent to be harsh, unreasonable or unjust under s 84 of *Industrial Relations Act 1996* (NSW) ("IR Act") – Where Pt 6 of Ch 2 of IR Act confers jurisdiction on IR Commission to review dismissal of "any public sector employee", including any member of NSW Police Force – Where s 72A of *Police Act* does not expressly exclude or modify reach of Pt 6 of Ch 2 of IR Act – Where s 85 of *Police Act* states Police Commissioner is employer of non-executive police officers for proceedings dealing with industrial matters – Whether *Police Act* excludes application of IR Act to decisions made under s 72A of *Police Act* – Whether IR Commission had jurisdiction to hear and determine application under s 84 of IR Act.

Words and phrases – "harsh, unreasonable or unjust", "indication of parliamentary intent", "Industrial Relations Commission", "jurisdiction to hear and determine", "non-executive police officer", "objective criteria", "overlapping statutes", "Police Commissioner", "police officer", "power to dismiss", "public sector employee", "retirement on medical grounds", "statutory construction", "unfair dismissal", "unique functions of the NSW Police Force".

Industrial Relations Act 1996 (NSW), ss 83, 84, Pt 6 of Ch 2.

Police Act 1990 (NSW), ss 44, 50, 72A, 80, 85, 181D, 218, Div 1C of Pt 9.

1 KIEFEL CJ, KEANE, GORDON AND STEWARD JJ. On 1 December 2016, the Commissioner of the NSW Police Force ("the Police Commissioner") notified the first respondent ("Mr Cottle") that he would be retired as a non-executive police officer pursuant to s 72A of the *Police Act 1990* (NSW)¹ with effect from 15 December 2016. Section 72A provides:

"If:

- (a) a non-executive police officer is found on medical grounds to be unfit to discharge or incapable of discharging the duties of the officer's position, and
- (b) the officer's unfitness or incapacity:
 - (i) appears likely to be of a permanent nature, and
 - (ii) has not arisen from actual misconduct on the part of the officer, or from causes within the officer's control,

the Commissioner may cause the officer to be retired."

2 Aggrieved, Mr Cottle sought relief in the Industrial Relations Commission of New South Wales ("the IR Commission"). Mr Cottle claimed that his "dismissal" was "harsh, unreasonable or unjust" for the purposes of s 84(1) of the *Industrial Relations Act 1996* (NSW) ("the IR Act"). The IR Commission dismissed Mr Cottle's application because it considered it had no jurisdiction to hear it. That decision was overturned by a Full Bench of the IR Commission.

3 The Police Commissioner sought a declaration (and other consequential relief) in the Supreme Court of New South Wales that the IR Commission did not have jurisdiction to hear and determine Mr Cottle's application². Simpson A-J decided that the Police Commissioner's application must succeed and ordered the declaratory relief sought. On appeal, the Court of Appeal of the Supreme Court of

1 Section 72A was repealed by Sch 3 to the *Government Sector Employment Legislation Amendment Act 2016 No 2* (NSW) and was replaced with an equivalent power inserted as s 94B in the *Police Act*.

2 *Commissioner of Police (NSW) v Cottle* (2019) 291 IR 215.

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New South Wales decided that the IR Commission did have jurisdiction to hear Mr Cottle's application³.

4 The sole issue for determination is thus whether a non-executive police officer, who has been retired pursuant to s 72A of the *Police Act*, may validly make an application pursuant to s 84(1) of the IR Act that she or he has been unfairly dismissed. Resolution of that issue turns upon the relationship between the *Police Act* and the IR Act, and requires a consideration of the scope and operation of each Act⁴.

5 For the reasons given below, the Court of Appeal correctly decided that the IR Commission did have jurisdiction to hear and determine Mr Cottle's application.

The scope and operation of the *Police Act*

6 The NSW Police Force is established by the *Police Act* and, at the time of Mr Cottle's retirement, relevantly comprised the Police Commissioner, members of the Senior Executive Service, and other (non-executive) police officers and administrative officers⁵.

7 The *Police Act* defines a "police officer" to be a "member of the NSW Police Force" who holds a "position which is designated under [the Act] as a position to be held by a police officer"⁶. The Police Commissioner is required to designate the positions to be held by police officers⁷. A position is to be so

3 *Cottle v Commissioner of Police (NSW)* (2020) 298 IR 202 ("*Cottle Appeal*").

4 In what follows, references to those two Acts are to the form each was in when Mr Cottle was notified of his retirement under s 72A on 1 December 2016.

5 *Police Act*, ss 3(1), 4, 5, 62 and 63. See also *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 21 [51] per Crennan, Kiefel and Bell JJ.

6 *Police Act*, s 3(1).

7 *Police Act*, s 11(1).

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designated if the Police Commissioner is relevantly satisfied that the holder will be required to carry out or be concerned in "operational police duties"⁸.

8 The Police Commissioner is responsible for the management and control of the NSW Police Force⁹. As such, the Police Commissioner may, amongst other things, classify and allocate the duties that members of the NSW Police Force are required to perform and instruct members with respect to the "management and control" of the NSW Police Force¹⁰. The Police Commissioner may also "create, abolish or otherwise deal with any position in the NSW Police Force" and "establish, or abolish, or change the name" of any branch of the NSW Police Force (other than the Senior Executive Service)¹¹. The Police Commissioner may appoint a person of good character and with suitable qualifications as a police officer of the rank of constable¹². Such a person, upon appointment, will hold a "position" in the NSW Police Force¹³.

9 Several provisions of the *Police Act* address issues concerning industrial matters and members of the NSW Police Force. For example, police officers at common law are not employees but are "independent office holders exercising original authority under statute and the common law"¹⁴. However, s 85 of the *Police Act* modifies that position in the case of non-executive police officers where there are proceedings concerning "industrial matters". Section 85 appears in Pt 6B of the *Police Act*, which is headed "Industrial matters relating to non-executive officers". In the case of non-executive police officers where there are proceedings concerning an "industrial matter", s 85 provides:

8 *Police Act*, s 11(2).

9 *Police Act*, s 8(1).

10 *Police Act*, s 8(3)-(4).

11 *Police Act*, s 10(2)(a) and (6).

12 *Police Act*, s 80(1).

13 *Police Act*, s 10(4).

14 *Cottle Appeal* (2020) 298 IR 202 at 217 [60] per Bell P (Basten and Payne JJA agreeing). See also *New South Wales v Briggs* (2016) 95 NSWLR 467 at 481-484 [50]-[63] per Leeming JA.

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"The Commissioner is to be the employer of non-executive officers for the purposes of any proceedings relating to non-executive officers held before a competent tribunal having jurisdiction to deal with industrial matters."

10 Pursuant to s 86, the Police Commissioner may determine the "salary, wages or other remuneration of a non-executive officer". Pursuant to s 87, the Police Commissioner may enter into an agreement with an association or organisation representing a group or class of non-executive police officers in relation to industrial matters (but only where the IR Commission has "jurisdiction to make an award or order with respect to that matter").

11 The Police Commissioner has three powers to dismiss a non-executive police officer. The first is the power in s 80(3) to dismiss any probationary police officer from the NSW Police Force "at any time and without giving any reason" (the operation of which was considered in the context of an unfair dismissal claim by this Court in *Commissioner of Police (NSW) v Eaton*¹⁵). The second is in s 72A, which is the subject of this appeal and is set out earlier in these reasons. A very similar power to cause the retirement of executive officers is also conferred on the Police Commissioner under s 50. The third is s 181D, which is the power to remove police officers in whom the Police Commissioner does not have confidence, having regard to their "competence, integrity, performance or conduct".

12 Section 72A was introduced into the *Police Act* in 2007 by the *Police Amendment Act 2007* (NSW). Substantially identical powers to cause the retirement of persons employed in the public sector have existed for some time in New South Wales¹⁶. Those powers include s 56 of the *Government Sector Employment Act 2013* (NSW), which replaced former s 25 of the *Public Sector Employment and Management Act 2002* (NSW). Upon the second reading of the *Police Amendment Bill 2007*, the then Minister observed that new s 72A "will be consistent" with s 25¹⁷. Save for the express reference to the need for "medical grounds" in s 72A, the two powers are almost identical.

15 (2013) 252 CLR 1.

16 See for example s 76 of the *Teaching Service Act 1980* (NSW); s 68Q(3), formerly s 68I, of the *Transport Administration Act 1988* (NSW).

17 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 27 November 2007 at 4360.

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13 The power of dismissal conferred by s 181D(1) of the *Police Act* provides for the ability to remove a police officer if the Police Commissioner does not have confidence in that officer's "suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct". The Police Commissioner must give the police officer a notice setting out the grounds for the proposed exercise of that power and, once exercised, the reasons for removal pursuant to that power¹⁸. The police officer so removed may apply, pursuant to Div 1C of Pt 9 of the *Police Act*, to the IR Commission for review on the ground that her or his dismissal was "harsh, unreasonable or unjust"¹⁹.

14 Division 1C of Pt 9 of the *Police Act* modifies what would otherwise be the procedure for reviewing a case of unfair dismissal in the IR Commission. For example, unlike the position prevailing under the IR Act, an applicant has the burden of establishing that her or his removal was "harsh, unreasonable or unjust"²⁰. In making its decision, the IR Commission must have regard to "the interests of the applicant" and "the public interest", which includes "the interest of maintaining the integrity of the NSW Police Force"²¹. Amongst other modifications, s 181G alters Pt 6 of Ch 2 of the IR Act; s 181H provides that the Police Commissioner is not compellable to give evidence; s 181I preserves the privilege against self-incrimination as provided under the *Evidence Act 1995* (NSW); and s 181K makes changes to the permitted constitution of the IR Commission for a review under Div 1C.

15 The *Police Act* expressly excludes the application of the IR Act in three places²². One of these is s 44, which excludes the power of the IR Commission to review the retirement (s 50) or removal (s 51) of an executive officer as a possible unfair dismissal. Section 44(1)-(2A) provides²³:

18 *Police Act*, s 181D(3)-(4).

19 *Police Act*, s 181E(1).

20 *Police Act*, s 181F(2).

21 *Police Act*, s 181F(3)(a)-(b).

22 *Police Act*, ss 44, 88 and 179.

23 Section 44 was also repealed by Sch 3 to the *Government Sector Employment Legislation Amendment Act 2016 No 2* and s 44(2) was replaced with an equivalent provision excluding the reach of the IR Commission in relation to any matter,

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"(1) In this section, a reference to the employment of an executive officer is a reference to:

...

(b) the removal, retirement, termination of employment or other cessation of office of an executive officer ...

(2) The employment of an executive officer, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the *Industrial Relations Act 1996*.

(2A) *Part 6 (Unfair dismissals) and Part 9 (Unfair contracts) of Chapter 2 of the Industrial Relations Act 1996 do not apply to or in respect of the employment of an executive officer.*" (emphasis added)

16 Critically, there is no equivalent to the foregoing provision in the case of the forced retirement of a non-executive police officer under s 72A.

17 Finally, there is s 218 of the *Police Act*, which provides:

"(1) The *Industrial Relations Act 1996* is not affected by anything in this Act.

(2) Subsection (1) does not limit section 44 or 88 or any provision of the *Industrial Relations Act 1996*."

18 Because of the express provisions in the *Police Act* which exclude the reach of the IR Act, s 218(1) was described as "patently erroneous" by the plurality in *Eaton*²⁴. Whilst that must be so, the plurality nonetheless also accepted that, by s 218, the *Police Act* recognised "the general jurisdiction of the IR Act"²⁵.

question or dispute relating to the employment of an executive officer: *Police Act*, s 42(1).

24 (2013) 252 CLR 1 at 30 [87] per Crennan, Kiefel and Bell JJ.

25 *Eaton* (2013) 252 CLR 1 at 31 [90] per Crennan, Kiefel and Bell JJ.

The scope and operation of the IR Act

19 Part 6 of Ch 2 of the IR Act deals with "unfair dismissals". Specifically, s 83(1) in Pt 6 provides that the Part applies to the dismissal of "any public sector employee". The term "public sector employee" is defined in the Dictionary to the IR Act to include a member of the NSW Police Force²⁶.

20 On an application made under s 84(1) of the IR Act, if satisfied that a dismissal was "harsh, unreasonable or unjust", the IR Commission may make an order for, among other things, reinstatement, re-employment, remuneration or compensation²⁷. It was not in dispute that causing retirement pursuant to s 72A of the *Police Act* constituted "dismissal" for the purposes of s 84(1) of the IR Act²⁸. In determining a claim, the IR Commission may take into account: whether the applicant was given a reason for dismissal and, if so, the nature of that reason; whether a warning of unsatisfactory performance had been given to the applicant before dismissal; the nature of the applicant's duties; whether the applicant requested reinstatement or re-employment; and such other matters as the IR Commission considers relevant²⁹.

21 The potential application of the IR Act to a non-executive police officer is not confined to unfair dismissals under Pt 6. It was not in dispute, for example, that pursuant to Pt 1 of Ch 2 of the IR Act, the IR Commission may, in a proceeding before it, make an award "setting fair and reasonable conditions of employment for employees"³⁰. It has authority in a proceeding before it to approve an enterprise agreement entered into between an employer and an industrial organisation or an employer and employees³¹. It also has authority to conciliate

26 See also *Eaton* (2013) 252 CLR 1 at 18 [43], 23 [61] per Crennan, Kiefel and Bell JJ.

27 IR Act, s 89. See also *Eaton* (2013) 252 CLR 1 at 24 [63] per Crennan, Kiefel and Bell JJ.

28 IR Act, s 83(5).

29 IR Act, s 88.

30 IR Act, s 10.

31 IR Act, Pt 2 of Ch 2; see specifically Div 2.

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and arbitrate an "industrial dispute"³². And it may enforce the provisions of the IR Act that address the right of an employee to, among other things, be free from victimisation³³. Pursuant to s 405(1)(b) of the IR Act, any award or order of the IR Commission does not have effect to the extent that it is inconsistent with 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".

The principles of construction for overlapping statutes

22 In *Eaton*, the plurality expressed the applicable principle of statutory construction as follows³⁴:

"Argument on the appeal proceeded upon the basis that the two statutes should be read together, 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*, Lord Wilberforce pointed to several possible interpretations where the field of application of two related statutes is 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?" (footnotes omitted)

23 After consideration of this Court's decision in *Ferdinands v Commissioner for Public Employment*³⁵, the plurality in *Eaton* referred to the presumption that

32 IR Act, Pt 1 of Ch 3.

33 IR Act, ss 210 and 213; see generally Pt 1 of Ch 5.

34 *Eaton* (2013) 252 CLR 1 at 18-19 [45] per Crennan, Kiefel and Bell JJ, quoting *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553.

35 (2006) 225 CLR 130.

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statutes do not contradict one another³⁶. In that respect, the principle that an Act of Parliament should be construed in a way that best achieves a harmonious result also informs the construction of two statutes which may share a field of operation³⁷. Nonetheless, if, properly construed, it is concluded that the two statutes or provisions cannot "stand or live together", the presumption is displaced³⁸. That "requires the construction of, and close attention to, the particular provisions in question"³⁹. Ultimately⁴⁰:

"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'."

The case for the Police Commissioner

24 The Police Commissioner focused on there being two overlapping statutes that potentially addressed the circumstances of a non-executive police officer's retirement on medical grounds. The Police Commissioner submitted that the power to cause retirement conferred by s 72A of the *Police Act* was necessarily inconsistent with the unfair dismissal regime contained in Pt 6 of Ch 2 of the IR Act. It followed, the Police Commissioner submitted, that Parliament must be taken to have intended that a non-executive police officer who has been retired pursuant to s 72A should not be entitled to make an application for unfair dismissal pursuant to s 84(1) of the IR Act. The power conferred by s 72A was, in that respect, said to be relevantly analogous to the power to dismiss probationary constables in s 80(3), which had been the subject of this Court's decision in *Eaton*, and which was found by the majority to be inconsistent with s 84(1) of the IR Act.

36 *Eaton* (2013) 252 CLR 1 at 19-20 [47]-[48] per Crennan, Kiefel and Bell JJ.

37 *Eaton* (2013) 252 CLR 1 at 28 [78] per Crennan, Kiefel and Bell JJ, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

38 *Eaton* (2013) 252 CLR 1 at 19-20 [48] per Crennan, Kiefel and Bell JJ, quoting *Ferdinands* (2006) 225 CLR 130 at 138 [18] per Gummow and Hayne JJ.

39 *Eaton* (2013) 252 CLR 1 at 20 [48] per Crennan, Kiefel and Bell JJ. See also *Ferdinands* (2006) 225 CLR 130 at 137-138 [18] per Gummow and Hayne JJ.

40 *Eaton* (2013) 252 CLR 1 at 19 [46] per Crennan, Kiefel and Bell JJ, quoting *Wyong Shire Council* [1975] AC 538 at 554 per Lord Wilberforce.

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25 The Police Commissioner emphasised the important and distinct role the NSW Police Force assumes within the community of New South Wales. Police officers are given special powers, are entrusted with the use of deadly weapons not available to members of the public, and are authorised, in defined circumstances, to use reasonable force in the course of carrying out their duties. They are commonly exposed to traumatic events and to violence. The NSW Police Force is a hierarchical command structure where lawful orders must be obeyed and where the Police Commissioner is required to manage and control the entire Police Force. None of these features were in dispute.

Construing s 72A of the *Police Act* and Pt 6 of Ch 2 of the IR Act together

26 Section 72A is a provision which has objective criteria for its operation. It relevantly confers a discretion on the Police Commissioner to retire a non-executive police officer if the following three conditions are present: the "police officer is found on medical grounds to be unfit to discharge or incapable of discharging [her or his] duties"⁴¹; the police officer's "unfitness or incapacity" appears likely to be of a "permanent nature"⁴²; and the "unfitness or incapacity" is not the result of "actual misconduct on the part of the officer, or from causes within the officer's control"⁴³.

27 Section 72A is distinguishable from s 80(3), as considered in *Eaton*, for two reasons. First, s 80(3) is concerned with probationary police officers, who undergo a process to achieve confirmation of their appointment as police officers. Their position, as the plurality observed, may be contrasted with that of a police officer who has been confirmed and "whose history in the Police Force may need to be taken into account by way of review of a dismissal"⁴⁴. Non-probationary police officers also have a greater expectation of job security than probationary police officers, "for the simple reason that they are not on probation"⁴⁵.

41 *Police Act*, s 72A(a).

42 *Police Act*, s 72A(b)(i).

43 *Police Act*, s 72A(b)(ii).

44 *Eaton* (2013) 252 CLR 1 at 27 [73] per Crennan, Kiefel and Bell JJ.

45 *Eaton* (2013) 252 CLR 1 at 13 [30] per Heydon J.

28 Secondly, the terms of s 80(3) are strongly suggestive of the Police Commissioner's "unfettered" power to dismiss⁴⁶. In that respect, the Police Commissioner "may dismiss any such probationary police officer from the NSW Police Force at any time and without giving any reason"⁴⁷. As the plurality observed, these words convey more than a power to dismiss without giving reasons. They imply "an unfettered power and therefore that the decision is not to be subjected to a review on the merits"⁴⁸. No equivalent language is found in s 72A. Section 72A, as previously stated, operates by reference to three objective criteria, the satisfaction of which enlivens the Police Commissioner's discretion to cause the retirement of a non-executive police officer.

29 It is true that, as with s 80(3), there is no obligation on the part of the Police Commissioner to give reasons for an exercise of power under s 72A. For the reasons given by the plurality in *Eaton*, this is a clear "indication" of parliamentary intention that supports the approach of the Police Commissioner⁴⁹. It arguably jars with the discretion given to the IR Commission to take into account whether a reason has been given for dismissal and, if given, the nature of that reason⁵⁰. However, the fact that the IR Commission may take into account whether a reason has been given for dismissal also indicates that a claim for unfair dismissal is capable of being determined in the absence of such reasons. Moreover, the objective criteria contained within s 72A provide a stable basis on which the IR Commission could assess whether an officer's dismissal was "harsh, unreasonable or unjust" for the purposes of s 84 of the IR Act even in the absence of reasons having been given.

30 Section 72A does not expressly exclude the reach of the IR Act in the case of non-executive police officers. In that respect, it is entirely unlike the treatment of executive officers under the *Police Act*. As stated above, the power to cause the retirement of executive officers under s 50 has been, by reason of s 44(2A), expressly immunised from the reach of Pt 6 of Ch 2 of the IR Act. That is a very

46 *Eaton* (2013) 252 CLR 1 at 27 [74] per Crennan, Kiefel and Bell JJ.

47 *Police Act*, s 80(3).

48 *Eaton* (2013) 252 CLR 1 at 31 [90] per Crennan, Kiefel and Bell JJ.

49 *Eaton* (2013) 252 CLR 1 at 27 [74]-[75], 28 [77] per Crennan, Kiefel and Bell JJ.

50 IR Act, s 88(a)-(b).

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powerful indication against the conclusion that the power to cause the retirement of non-executive police officers under s 72A shares the same immunity⁵¹.

31 The language of s 72A does not, by reason of necessary implication, exclude the operation of Pt 6 of Ch 2 of the IR Act. For the reasons already expressed, s 72A confers a power to cause retirement substantially similar to those powers that have been enacted in relation to other public sector employees, and which now apply more broadly to all public sector or public service employees⁵². The power is thus not unique to the NSW Police Force. When retired, those public sector employees generally enjoy rights to seek review in the IR Commission for unfair dismissal. Thus, as Bell P correctly observed in the Court of Appeal, "it would be anomalous in the extreme" if non-executive police officers were to be denied a remedy afforded generally to public sector employees⁵³. As Bell P also correctly observed, there is no necessary inconsistency between the power to cause retirement under s 72A and rights of review under the IR Act that would justify a conclusion that s 84(1) of the IR Act should "yield" to the *Police Act*⁵⁴.

32 Further, the elaborate modification of rights of review for police officers removed pursuant to s 181D of the *Police Act* does not support a conclusion that s 72A is, by implication, inconsistent with Pt 6 of Ch 2 of the IR Act. Contrary to the submissions of the Police Commissioner, the rights conferred by Div 1C of Pt 9 of the *Police Act*, and the modifications made by that Division to Pt 6 of Ch 2 of the IR Act, do not support a broad proposition that Parliament intended to treat the employment of police officers differently from the employment of other public sector employees. Rather, they support the narrower proposition that Parliament intended to confer such rights and make such modifications only in the case of a police officer removed for reasons related to the officer's "competence, integrity, performance or conduct"⁵⁵. If Parliament had wanted to prescribe similar rights and modifications in the case of an exercise of the power to cause retirement of non-executive police officers on medical grounds, or indeed had wanted to immunise the exercise of such power entirely from the reach of Pt 6 of Ch 2 of the

51 cf *Eaton* (2013) 252 CLR 1 at 19 [46], 27 [72] per Crennan, Kiefel and Bell JJ.

52 *Government Sector Employment Act*, s 56.

53 *Cottle Appeal* (2020) 298 IR 202 at 219 [76] (Basten and Payne JJA agreeing).

54 *Cottle Appeal* (2020) 298 IR 202 at 218 [70] (Basten and Payne JJA agreeing).

55 *Police Act*, s 181D(1).

IR Act⁵⁶, it could easily have done so through legislative means. Significantly, Parliament has not done so.

33 No necessary anomaly arises from the conclusion that non-executive police officers dismissed for "cause" under s 181D would have lesser review rights than non-executive police officers retired "without cause" under s 72A. The basis for that supposed anomaly is an assumption that a non-executive police officer retired under s 72A should not be entitled to the same rights of review as other public sector employees simply because lesser rights are conferred in the case of a police officer's removal under s 181D⁵⁷. The correctness of that assumption has not been demonstrated. Moreover, it has not been shown that the reasons suggested as to why Parliament might have reposed a power in the Police Commissioner to cause the retirement of a non-executive police officer under s 72A, namely, the unique functions of the NSW Police Force and the Police Commissioner's responsibility for the management of the NSW Police Force, were necessarily antithetical to the right of review for unfair dismissal by the IR Commission.

34 Nor is it correct to observe that the "primary" remedies for unfair dismissal, namely, reinstatement or re-employment⁵⁸, are not apt to be applied in the case of a review of a non-executive police officer's retirement caused by an exercise of the power in s 72A of the *Police Act*⁵⁹. First, this overlooks that compensation is another remedy which may be available⁶⁰. Secondly, that which might be "harsh, unreasonable or unjust" for the purposes of s 84(1) of the IR Act could well include conclusions reached about a police officer's degree of unfitness, the nexus between the unfitness and the discharge of an officer's position, and the cause of the unfitness. It could also include matters going to the discretionary power to cause a police officer to be retired. In a given case, it might be appropriate to reinstate an officer because of a mistaken, and thus arguably unjust, conclusion concerning the

56 cf *Police Act*, s 44.

57 In any event, consideration of the so called "anomalous" consequences of a particular construction of legislation is a matter to be approached with caution: see *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511 at 518-519 per Black CJ and Sundberg J.

58 IR Act, s 89(1)-(2).

59 cf *Eaton* (2013) 252 CLR 1 at 10 [19] per Heydon J.

60 IR Act, s 89(5).

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police officer's unfitness. It might be appropriate to re-employ a police officer in a different position because it would be "harsh, unreasonable or unjust" not to do so. Where it would be impracticable to order remedies of this type, the IR Commission would then still have the power to order compensation⁶¹.

35 Finally, it may be accepted that the NSW Police Force performs unique functions. But that characterisation of the Police Force must yield to the terms of the IR Act and its express inclusion, for the purposes of Pt 6 of Ch 2 of the IR Act, of its members. It must also yield to the terms of both ss 85 and 218 of the *Police Act*. As already mentioned, whilst s 218 has in part been found to be "patently erroneous"⁶², it does not mean that it should not otherwise be included as an "indication" of parliamentary intent. The Court of Appeal was thus correct to emphasise the presence of both ss 85 and 218 in the *Police Act*.

36 The appeal should be dismissed with costs.

61 Pursuant to s 89(5) of the IR Act, compensation may be ordered where the IR Commission considers that it would be "impracticable to make an order for reinstatement or re-employment".

62 *Eaton* (2013) 252 CLR 1 at 30 [87] per Crennan, Kiefel and Bell JJ.

37 GAGELER J. The Police Commissioner did not dispute that Pt 6 of Ch 2 of the IR Act is expressed in terms capable of application to the compulsory retirement on medical grounds of non-executive police officers under s 72A of the *Police Act* in the same way as those terms indisputably apply to the compulsory retirement on medical grounds of other categories of public sector employees under materially identical provisions of the *Teaching Service Act 1980* (NSW)⁶³, the *Transport Administration Act 1988* (NSW)⁶⁴ and the *Government Sector Employment Act 2013* (NSW)⁶⁵. The Police Commissioner nevertheless argued that compulsory retirement on medical grounds of non-executive police officers under s 72A of the *Police Act* "is not apt to be addressed under general industrial relations legislation". The overarching theme of the argument was that the peculiar nature of police work is such that the Police Commissioner must have unique power to determine the merits of the compulsory retirement of a police officer on medical grounds. A complementary theme of the argument was that the modified application of Pt 6 of Ch 2 of the IR Act to the summary removal of a police officer in whom the Police Commissioner does not have confidence under Div 1C of Pt 9 of the *Police Act* "indicates that Parliament intended the *Police Act* to embody special provisions, to the exclusion of the general provisions of the IR Act regarding the remedies available in relation to discipline and dismissal of police officers".

38 The complete answer to the Police Commissioner's argument in my opinion lies in the express statement of legislative intention in s 218(1) of the *Police Act* that the IR Act "is not affected by anything in" the *Police Act*. As I said in *Commissioner of Police (NSW) v Eaton*⁶⁶, "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".

39 Of course, the legislative intention stated in s 218(1) of the *Police Act* is not unqualified. Plainly, it is qualified by the operation of the provisions of the *Police Act* referred to in s 218(2) (noting that the obvious error in s 218(2) to which attention was drawn in *Eaton*⁶⁷ has since been legislatively corrected⁶⁸). Plainly, it is qualified by the operation of other provisions of the *Police Act* that are expressed

63 Section 76.

64 Section 68Q(3).

65 Section 56.

66 (2013) 252 CLR 1 at 35 [104].

67 (2013) 252 CLR 1 at 14 [32], 30 [86].

68 Schedule 3.22 [3] to the *Statute Law (Miscellaneous Provisions) Act 2014* (NSW).

to exclude provisions of the IR Act, of which Div 1C of Pt 9 of the *Police Act* is an example. According to the plurality in *Eaton*, it is also qualified by the "impliedly inconsistent"⁶⁹ operation of s 80(3) of the *Police Act*.

40 However, as the plurality in *Eaton* recognised⁷⁰ in referring to *Rose v Hvrice*⁷¹, although the express statement of legislative intention in s 218(1) of the *Police Act* must yield to "[e]xplicit or implicit contradiction", the express statement of legislative intention must be taken to prevail against "merely inferential contradiction"⁷². Put in other words drawn from *Rose v Hvrice*, "while an exception ... may be effected by an inconsistent implication in [another] provision ... it cannot result from an enactment which is not inconsistent in meaning and therefore in operation, even though the [other provision] provide[s] ground for a conclusion that the draftsman's train of thought, if logically pursued, would have led him to enact the exception"⁷³.

41 The Police Commissioner's argument, on analysis, rises no higher than one of inferential contradiction. The considerations on which the Police Commissioner relied are insufficient to create a further qualification to the express statement of legislative intention in s 218(1) of the *Police Act*.

42 Accordingly, I agree that the appeal should be dismissed.

69 (2013) 252 CLR 1 at 31 [90].

70 (2013) 252 CLR 1 at 31 [89].

71 (1963) 108 CLR 353.

72 (1963) 108 CLR 353 at 358 (cleaned up).

73 (1963) 108 CLR 353 at 358.

