

A Heart of Darkness: The Mysterious Interior of Ferdinands v Commissioner for Public Employment

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Abstract

In *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, the High Court applied established principles of implied repeal to the intersection between the *Police Act* 1998 (SA) ('the Police Act') and the *Industrial and Employees Relations Act* (1994) (SA) ('the Industrial Act'). The issue was whether both enactments could apply to the termination of appointment of police officers. Although a four to one majority accepted that the Police Act excluded the operation of the Industrial Act with respect to the termination of police appointments, the judgments adopted different approaches to statutory interpretation, parts of which contained cryptic and contentious reasoning. Despite showing general agreement on the broad principles of implied repeal, the case introduces uncertainty into the law because of the gaps and ambiguities in the application of these principles to the relevant legislative matrix.

1. Introduction

Ferdinands v Commissioner for Public Employment ('*Ferdinands*')¹ is the most recent High Court decision regarding the doctrine of implied repeal. The case concerned the intersection between the disciplinary provisions of the *Police Act* 1998 (SA) ('the Police Act') and the unfair dismissal provisions of the *Industrial and Employees Relations Act* 1994 (SA) ('the Industrial Act').² Applying a test of inconsistency, the majority found that the Police Act impliedly repealed the Industrial Act to the extent that the latter would have operated on the termination of appointment of police officers. The key finding was that the Police Act was intended to be exhaustive on this subject matter.

However, beyond the apparent simplicity of this result, the intermediate reasoning of the majority raises many questions. The relevance of the distinction between explicit and implicit contradiction is unclear. There are reasons to question the permissibility of considering the subject matter, standing alone, of the

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1 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 ('*Ferdinands*').

2 Now referred to as the *Fair Work Act* 1994 (SA).

repealing Act. There is some doubt as to the extent to which the two Acts could be read together, and how this may have affected the result. The inconclusive analysis of the *Termination of Employment Convention*³ is distracting, and the implications flowing from the nature of the Industrial Act as beneficial legislation are unclear. One judge in the majority even departed from orthodox methods of statutory interpretation to rely on an imaginative reconstruction.

These questions reflect the difficulty in generating cohesion between judgments in questions of implied repeal, as each judge may address different, as well as similar, features of the legislative matrix. However, this problem is compounded when there are gaps in the internal reasoning of the judgments. Accordingly, *Ferdinands* does little more than stand for broad statements of principle – it provides scarce guidance for future cases in dealing with the detailed reasoning behind implied repeal.

2. *Preliminary Issues*

A. *Facts and Procedural History*

Mr Trevor Ferdinands was a police officer in the South Australia Police Force ('the Police Force'). In December 1999, he was involved in an incident which led to him being convicted of assault.

On 22 November 2001, the Commissioner of Police ('the Commissioner') sent a letter terminating Ferdinands' service with the Police Force. In response, Ferdinands instituted a number of legal proceedings with the purpose of obtaining a reinstatement of his employment.

Two of these proceedings were ultimately not pursued. Ferdinands initiated an appeal against his criminal conviction in the Supreme Court of South Australia, which was subsequently abandoned. He also sought judicial review of the Commissioner's decision in the District Court of South Australia, pursuant to s 46(2) of the *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA). These proceedings were dismissed for want of jurisdiction.⁴ Ferdinands did not contest this finding.

Third, Ferdinands applied to the Industrial Commission ('the Commission'), under s 106 of the Industrial Act for relief against what he alleged to be his unfair dismissal. The Commission referred certain questions to the Industrial Relations Court of South Australia (the 'IRC'), including whether the Commission had jurisdiction to determine Ferdinand's application.⁵ The Full Court of the IRC found that the Police Act excluded the jurisdiction of the Commission to review decisions by the Commissioner to terminate the employment of a police officer.⁶

3 *Termination of Employment Convention*, opened for signature June 22 1982, ILO C 158 (entered into force 23 November 1985).

4 *Ferdinands* (2006) 225 CLR 130 at 150–1 (Kirby J).

5 *Ferdinands v Commissioner for Public Employment* [2003] SAIRC 19 at [1]–[2].

6 *Ferdinands v Commissioner for Public Employment* [2003] SAIRC 19 at [23].

Ferdinands then sought leave to appeal to the Full Court of the Supreme Court of South Australia. That court refused leave to appeal, upholding the decision of the IRC.⁷ Ferdinands then applied for special leave to appeal to the High Court, which was granted. At all times, the Commissioner of Police was represented by the Commissioner of Public Employment.

B. The Enactments

The problem for Ferdinands was that although the Police Act allowed the Commissioner to make a decision to terminate his employment if he had committed an offence, it did not provide for merits review in respect of that decision. The Police Act provided that:

- where a member of the Police Force is found guilty of an offence under the laws of South Australia, any state or territory of the Commonwealth, or the Commonwealth itself (as specified by s 40(1)(a));
- the Commissioner may, under the rest of s 40(1), undertake or order 12 forms of action against that police officer, including termination of appointment a ‘termination decision’,⁸ suspension,⁹ and reduction of remuneration,¹⁰ and
- merits review in the Police Tribunal is only allowed in respect of certain types of termination decisions, not including those based on the commission of an offence by a police officer (‘the s 48 reservation’).¹¹

Accordingly, Ferdinands was forced to look outside of the Police Act to obtain merits review of the Commissioner’s decision. He relied on provisions of the Industrial Act as an avenue to merits review by the Industrial Commission. The provisions of the Industrial Act included:

- s 106, which allows employees to apply to the Commission for relief if they have been dismissed by their employer;
- s 108, which requires the Commission to determine whether the dismissal was ‘harsh, unjust or unreasonable’; and
- s 109, which provides that if the Commission is affirmatively satisfied of the question in s 108, it is empowered to order a number of remedies, including re-employment to the employee’s former position,¹² re-employment to another position on conditions determined by the Commission,¹³ or the payment of compensation.¹⁴

7 *Ferdinands v Commissioner for Public Employment* [2004] SASC 30 at [55] (Bleby J, with whom Prior J agreed; Debelle J dissenting).

8 *Police Act 1998* (SA) s 40(1)(d).

9 *Police Act 1998* (SA) s 40(1)(e).

10 *Police Act 1998* (SA) s 40(1)(f).

11 *Police Act 1998* (SA) s 48.

12 *Industrial and Employee Relations Act 1994* (SA) s 109(1)(a).

13 *Industrial and Employee Relations Act 1994* (SA) s 109(1)(b).

14 *Industrial and Employee Relations Act 1994* (SA) s 109(1)(c).

Ferdinands submitted that the Commissioner's power under s 40(1) was subject to the unfair dismissal provisions of the Industrial Act. The overarching issue was the true construction of the enactments, to be decided between two possibilities:

- either that the Police Act, as a special statutory regime for the regulation of the Police Force, exhaustively specified the circumstances where a decision to terminate the appointment of a police officer could be made or appealed; or
- that the industrial relations regime contained in the Industrial Act, broadly regulating employment matters, also operated on the termination of police officers' employment to provide an avenue of merits review for decisions made under s 40(1) of the Police Act.

The High Court dismissed the appeal. A majority of four to one¹⁵ found that the Police Act impliedly repealed the Industrial Act, to the extent to which the latter would have applied otherwise to termination decisions by the Commissioner.

3. *Legal Issues*

A. *Bird's Eye View of Implied Repeal*

Before analysing the judgments in *Ferdinands*, it is useful to briefly outline the key features of implied repeal. The doctrine reflects the maxim of statutory interpretation *leges posteriores priores contrarias abrogant*: later Acts repeal earlier inconsistent Acts. Griffith CJ in *Goodwin v Phillips* provides a convenient statement of the law:

[W]here the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication [I]f the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.¹⁶

Implied repeal involves construing both Acts¹⁷ to determine whether there is an inconsistency.¹⁸ There must be very strong grounds for implied repeal. Enactments must be 'so inconsistent or repugnant that they cannot stand together'.¹⁹ A more

15 Gleeson CJ, Gummow, Hayne & Callinan JJ; Kirby J dissenting.

16 *Goodwin v Phillips* (1908) 7 CLR 1 at 7 (Griffith CJ). See also Dennis Pearce & Robert Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at 252–61.

17 *Ferdinands* (2006) 225 CLR 130 at 145 (Gummow & Hayne JJ).

18 *Ferdinands* (2006) 225 CLR 130 at 137–8 (Gummow & Hayne JJ) citing *Goodwin v Phillips* (1908) 7 CLR 1 at 7 (Griffith CJ); *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 (Fullagar J), 290 (Windeyer J) ('*Butler*'); *Rose v Hvrac* (1963) 108 CLR 353 at 360 (Kitto, Taylor & Owen JJ); *Saraswati v R* (1991) 172 CLR 1 at 17 (Gaudron J); *Shergold v Tanner* (2002) 209 CLR 126 at 136–7 (Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ).

specific way of formulating this requirement was stated by Gaudron J in *Saraswati v R*:

It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed... by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other.²⁰

Generally, if it is open on the words of the later Act, a construction which will save the earlier Act from repeal is to be adopted.²¹ For convenience, this will be referred to as the ‘*Saraswati* principle’ or ‘presumption’.

B. The Meaning of ‘Inconsistency’

Implied repeal will turn on a test of inconsistency. Oddly, there was no majority on the nature of the inconsistency in *Ferdinands*. In *Rose v Hvrlic*,²² the High Court distinguished between ‘[e]xplicit and implicit contradiction’.²³ In *Ferdinands*, Gleeson CJ explained that explicit contradictions arise from two ‘conflicting commands, which both cannot be obeyed or produce legal rights or obligations which cannot be reconciled’, whereas implied contradictions are a matter of ‘necessary implication’ from irreconcilable ‘contrariety in the two legislative schemes’.²⁴ The Chief Justice proceeded to determine *Ferdinands* on the basis of an implicit contradiction because the terms of the enactments were not directly in conflict.²⁵ On the other hand, Gummow and Hayne JJ expressed no view as to whether the contradiction was explicit or implicit.²⁶ The avoidance of a classification questions the usefulness of the distinction.

On one view, the nature of the contradiction will determine which factors are relevant to finding it. In *Butler v Attorney-General (Vic)*, Taylor J found an explicit contradiction. Section 32 of the *Public Service Act 1946 (Vic)* (‘the Public Service Act’) provided that in the appointment of a person to any office, consideration should be given to relative efficiency and, in the event of equality of efficiency, to relative seniority. This was argued to be inconsistent with s 10 of the *Discharged Servicemen’s Preference Act 1943 (Vic)* (‘the Preference Act’), which provided for preference in promotion to ex-servicemen. Taylor J found an implied repeal simply

19 *Goodwin v Phillips* (1908) 7 CLR 1 at 10 (Barton J). See also *Rose v Hvrlic* (1963) 108 CLR 353 at 359 (Kitto, Taylor & Owen JJ); *Butler v Attorney-General for Victoria* (1961) 106 CLR 268 at 280 (Kitto J) citing *Re Silver Bros Ltd* [1932] AC 514 at 523 (Viscount Dunedin).

20 *Saraswati v R* (1991) 172 CLR 1 at 17 (Gaudron J), cited in *Ferdinands* (2006) 225 CLR 130 at 134 (Gleeson CJ), 138 (Gummow & Hayne JJ), 163 (Kirby J).

21 *Goodwin v Phillips* (1908) 7 CLR 1 at 10 (Barton J).

22 *Rose v Hvrlic* (1963) 108 CLR 353.

23 *Rose v Hvrlic* (1963) 108 CLR 353 at 358 (Kitto, Taylor & Owen JJ).

24 *Ferdinands* (2006) 225 CLR 130 at 133–4 (Gleeson CJ). See also *Ferdinands* (2006) 225 CLR 130 at 145–6 (Gummow & Hayne JJ).

25 *Ferdinands* (2006) 225 CLR 130 at 133–4 (Gleeson CJ).

26 *Ferdinands* (2006) 225 CLR 130 at 148–9 (Gummow & Hayne JJ).

because the provisions were ‘directly in conflict’ and it was ‘impossible for both to have full operation’.²⁷ In contrast, the majority in *Rose v Hvriv* identified an implicit contradiction. Because they could not rely on a simple textual test of inconsistency, it was necessary to consider whether the later enactment exhibited ‘an intention to deal exhaustively’ with the subject matter.²⁸ These authorities suggest that a direct contradiction may be identified by uncovering a simple textual conflict; only in the case of indirect contradiction is it necessary to have regard to other factors.

Alternatively, the distinction does not need to be applied in every case. Although *Butler* clearly concerned an explicit contradiction, Kitto J still examined the nature and exhaustiveness of the Public Service Act.²⁹ By avoiding classification, Gummow and Hayne JJ may be following the approach of Kitto J. In cases where there is a clear inconsistency, it may not be necessary to apply the distinction. However, it is arguably best practice to do so. Kitto J could have decided *Butler* more parsimoniously had he applied the distinction and based his conclusion on a simple textual conflict. That he unnecessarily examined the nature and exhaustiveness of the Public Service Act suggests that he applied the wrong considerations to the wrong facts. Practically, this made no difference to the result in *Butler*; undoubtedly, it affected the quality of the reasoning. Gummow and Hayne JJ’s reluctance to classify the contradiction in *Ferdinands* could pave the way for similar problems in future cases.

C. *The Appearance of Exhaustiveness*

For the majority, the inconsistency in *Ferdinands* was supported by the construction of the Police Act, which showed that it was exhaustive. This suggested that Parliament intended an exclusion of the Industrial Act. The method was consistent with the literal approach to statutory interpretation, defined by Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*:

a statute is to be expounded according to the intent of the Parliament that made it; and that [objective] intention has to be found by an examination of the language used in the statute as a whole.³⁰

Before considering the specific features of the legislative matrix going towards the appearance of exhaustiveness, it is useful to briefly consider other factors examined by the judges to support this finding.

(i) *The Nature of the Enactment*

Gleeson CJ considered ‘the nature of the subject of police appointment’.³¹ He placed reliance on *Butler*, where Kitto J stated ‘it is in the nature of s 32 of the

²⁷ *Butler* (1961) 106 CLR 268 at 284 (Taylor J).

²⁸ *Rose v Hvriv* (1963) 108 CLR 353 at 359 (Kitto, Taylor & Owen JJ).

²⁹ *Butler* (1961) 106 CLR 268 at 280–1 (Kitto J).

³⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161–2 (Higgins J).

³¹ *Ferdinands* (2006) 225 CLR 130 at 136 (Gleeson CJ).

Public Service Act as much as in its words' that incompatibility arose.³² It should be noted that there is a crucial difference between the two judgments. Kitto J examined the text of the Preference Act, which prescribed a 'procedure to be followed [containing] specified considerations in the specified order' so that all other considerations were excluded.³³ In contrast, Gleeson CJ went beyond the text to consider the nature of the subject matter, namely 'the disciplined nature of the police force, the [Police Commissioner's] responsibilities of control and management' and broader issues of 'morale and integrity'.³⁴ For Gleeson CJ, these concerns underpinned the s 48 reservation in the Police Act.³⁵

The Chief Justice's approach is problematic because it draws inferences from the subject matter of the enactment in order to discern the objective intention of Parliament. It is inconsistent with the literal approach, which focuses on the text. Gleeson CJ's approach is almost akin to the purposive approach, where a construction of an enactment is adopted which would be consistent with its purpose.³⁶ However, a purposive construction relies on the identification of a purpose, usually deduced by looking at the statute as a whole or from extrinsic materials.³⁷ Gleeson CJ draws his argument from the subject matter generally, rather than from a purpose identified through permissible methods. Because this element of the Chief Justice's judgment seems inconsistent with the two established approaches to statutory interpretation, its permissibility as a consideration is doubtful.

(ii) *The Considerations that Inform the Enactment*

In contrast, Gummow and Hayne JJ considered the broader aims of the enactments without departing from a textual analysis. After construing both Acts, their Honours found that 'different considerations inform the exercise of power under the Police Act from those that inform the exercise of power under the wrongful dismissal provisions of the Industrial Act'.³⁸ On the one hand, the Industrial Act was concerned with 'industrial justice'.³⁹ Its objects included the remedying of employment-related grievances, providing a right of review of unfair dismissals and ensuring industrial fair play.⁴⁰ Further, the Industrial Act contained provisions dealing with other matters including the settlement of industrial disputes, the making of awards, and enterprise agreements.⁴¹

32 *Butler* (1961) 106 CLR 268 at 280 (Kitto J).

33 *Butler* (1961) 106 CLR 268 at 280–1 (Kitto J).

34 *Ferdinands* (2006) 225 CLR 130 at 136 (Gleeson CJ).

35 *Ferdinands* (2006) 225 CLR 130 at 136 (Gleeson CJ).

36 Pearce & Geddes, above n16 at 27.

37 Pearce & Geddes, above n16 at 28.

38 *Ferdinands* (2006) 225 CLR 130 at 147 (Gummow & Hayne JJ).

39 *Ferdinands* (2006) 225 CLR 130 at 147 (Gummow & Hayne JJ).

40 *Ferdinands* (2006) 225 CLR 130 at 139 (Gummow & Hayne JJ) citing the *Industrial and Employee Relations Act* 1994 (SA) s 3.

41 *Ferdinands* (2006) 225 CLR 130 at 141 (Gummow & Hayne JJ) citing the *Industrial and Employee Relations Act* 1994 (SA) ss 7–65, ss 197–205, 90–99, 73–89.

In contrast, s 6 of the Police Act made the Commissioner responsible for the control and management of the Police Force.⁴² Under s 5, the purpose of the Police Force was to “reassure and protect the community”...by providing services to uphold the law’.⁴³ The Commissioner was to exercise his or her powers under s 40(1) with regard to these purposes,⁴⁴ establishing and maintaining a police force ‘whose members are not only sworn to uphold and enforce the criminal law, but do so in fact’.⁴⁵ These considerations were inconsistent with the purposes of industrial justice.

In this way, Gummow and Hayne JJ considered the objectives of the legislation as identified by their text. This was consistent with a purposive approach and was undoubtedly permissible to support the conclusion that the Police Act was intended to be exhaustive.

(iii) *Potential Derogation from the Norms of the Termination of Employment Convention*

In construing the Industrial Act, Gummow and Hayne JJ noted that s 108(2) obliged the Commission, in deciding whether a dismissal was harsh, unjust or unreasonable, to have regard to the *Termination of Employment Convention* (‘the Convention’).⁴⁶ The effect of s 40 of the Police Act was to give the Commissioner a discretion that was unreviewable on its merits. If this was inconsistent with the Convention, it would have been more difficult to show that an implied repeal was intended by Parliament. The relevant Convention articles included:⁴⁷

- art 4, which provides that a worker ‘shall not be terminated unless there is a valid reason...connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service’;
- art 8, which empowers an impartial body to, under art 9 ‘examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified’; and
- art 5, which identifies some matters which will not constitute valid reasons for termination, including union membership or activities, race, colour and sex.

Gummow and Hayne JJ found that an implied repeal was not at odds with the Convention.⁴⁸ ‘Harsh, unjust or reasonable’ terminations of employment were not identified by art 5 as being invalid, and the Convention did not further specify what was or was not justification beyond its reference.⁴⁹ Their Honours referred to the

42 *Ferdinands* (2006) 225 CLR 130 at 142 (Gummow & Hayne JJ).

43 *Ferdinands* (2006) 225 CLR 130 at 143 (Gummow & Hayne JJ) citing the *Police Act* 1998 SA s 5.

44 *Ferdinands* (2006) 225 CLR 130 at 143 (Gummow & Hayne JJ).

45 *Ferdinands* (2006) 225 CLR 130 at 147 (Gummow & Hayne JJ).

46 *Ferdinands* (2006) 225 CLR 130 at 139–40 (Gummow & Hayne JJ).

47 *Ferdinands* (2006) 225 CLR 130 at 140–1 (Gummow & Hayne JJ).

48 *Ferdinands* (2006) 225 CLR 130 at 140–1 (Gummow & Hayne JJ).

49 *Ferdinands* (2006) 225 CLR 130 at 140 (Gummow & Hayne JJ).

High Court in *Victoria v Commonwealth*, which noted that ‘the “harsh, unjust or unreasonable” criterion is a criterion which has a content different from that which the Convention provided’ and goes beyond the requirements of the Convention.⁵⁰ Without more, criminal conduct by a police officer was *prima facie* a valid reason under the Convention for a termination of employment.⁵¹

For Kirby J in dissent, an implied repeal infringed art 8, which empowered an ‘impartial body’ to, under art 9, ‘examine the reasons given for the termination...to render a decision on whether the termination was justified’. This involved merits review, something that an implied repeal would exclude in relation to decisions under s 40(1)(a).⁵²

After evaluating these judgments, it is still unclear whether s 40 is inconsistent with the Convention. As Kirby J pointed out, art 9 would generally prescribe merits review. However, art 9 is to be read in conjunction with art 4, which only prohibits the termination of employment without a ‘valid reason’.⁵³ The effect of art 4 is that merits review under art 9 is only available in some cases, depending on the meaning of a ‘valid’ reason. In the case of the Police Act, determining the validity of a decision under s 40(1)(a) involves deciding whether the only criterion for validity is the commission of an offence under the section itself (which seems to be Gummow and Hayne JJ’s tentative conclusion), or if the wrongful dismissal provisions of the Industrial Act may also affect validity. In other words, whether a reason for the termination of employment is ‘valid’ or not depends on whether there has been an implied repeal. What the judgments failed to recognise is that the issue cannot be determined separately from the broader issues which underpinned the case.

(iv) *The Exhaustiveness of the Repealing Enactment*

The considerations mentioned so far went towards the crucial factor in *Ferdinands* – whether the Police Act was exhaustive on the topic of police discipline and appointment. The prominence of this factor reflects a problem with applying the maxim *leges posteriores priores contrarias abrogant*. As Kirby J noted, it was difficult to identify which of the Police Act and Industrial Act came ‘earlier’ or ‘later’, given the constantly changing character of the enactments due to amendment.⁵⁴ In principle, the appearance of exhaustiveness is a better indicator of which enactment is to be repealed, and which does the repealing.

Gleeson CJ construed the Police Act to conclude that it had the appearance of exhaustiveness.⁵⁵ The Police Act set up ‘an elaborate system of merits review of

50 *Ferdinands* (2006) 225 CLR 130 at 140–1 (Gummow & Hayne JJ) citing *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 517–8 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

51 *Ferdinands* (2006) 225 CLR 130 at 140 (Gummow & Hayne JJ).

52 *Ferdinands* (2006) 225 CLR 130 at 167–8 (Kirby J).

53 See *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 517 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

54 *Ferdinands* (2006) 225 CLR 130 at 157, 161–2 (Kirby J).

55 *Ferdinands* (2006) 225 CLR 130 at 134 (Gleeson CJ).

decisions relating to transfer, promotion, termination on certain grounds and discipline'.⁵⁶ Six factors supported this conclusion:

- The Commissioner was responsible under s 6 for the control and management of the Police Force, subject to the directions of the Minister. Significantly, s 7 excluded ministerial directions in relation to the appointment, transfer, remuneration, discipline or termination of a particular person.⁵⁷
- The existence of the Commissioner's powers under s 40, which have already been discussed. These powers were also triggered where a police officer was found by the Police Disciplinary Tribunal to have breached the police Code of Conduct.⁵⁸
- The principles of procedural fairness still applied to the operation of the Police Act.⁵⁹
- The Police Act and the *Police Complaints and Disciplinary Proceedings Act* 1985 (SA) established 'a special statutory regime for complaints against, and discipline of, members of the police force'⁶⁰ consisting of the Police Complaints Authority and two tribunals.
- An avenue of appeal to the District Court was available in respect of certain decisions under s 40(1), such as those based on mental incapacity. Findings by the Police Disciplinary Tribunal that a police officer was guilty of a breach of discipline, or concerning decisions by the Commissioner imposing punishment for a breach of discipline, could also be reviewed under this avenue.⁶¹
- The s 48 reservation, which has already been discussed, was cited.⁶²

In addition to Gleeson CJ's analysis, Gummow and Hayne JJ highlighted the obligation of the Commissioner to exercise his or her powers fairly.⁶³ Section 10(2) bound the Police Commissioner to 'ensure that practices are followed under which employees are treated fairly and consistently and are not subjected to arbitrary or capricious administrative decisions'.⁶⁴ Their Honours found that if the Commissioner acted in accordance with s 10(2), there would usually be compliance with the unfair dismissal provisions of the Industrial Act because '[w]hat is fair and consistent and is not arbitrary or capricious will usually not be harsh, unjust or unreasonable.'⁶⁵ This suggested that the Police Act was truly

56 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ).

57 *Ferdinands* (2006) 225 CLR 130 at 134 (Gleeson CJ).

58 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ).

59 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ). See *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44.

60 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ).

61 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ).

62 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ).

63 *Ferdinands* (2006) 225 CLR 130 at 142-5 (Gummow & Hayne JJ).

64 *Police Act* 1998 (SA) s 10(2)(b).

65 *Ferdinands* (2006) 225 CLR 130 at 147 (Gummow & Hayne JJ).

intended to be exhaustive because it contained internal mechanisms to deal with unfair decision making.

Kirby J, dissenting, discussed three countervailing factors. First, he placed reliance on the language of s 106 of the Industrial Act, expressed in general terms, which placed police officers within the ambit of the unfair dismissal provisions.⁶⁶ He argued that it would have been easy for the drafters of the Police Act to expressly exclude police officers from the ambit of the Industrial Act. However, Kirby J conceded that this argument assumes that the Police Act was later in time⁶⁷ – an issue which was not conclusively determined in *Ferdinands*.

Second, Kirby J argued that the unfair dismissal provisions of the Industrial Act were ‘beneficial laws’ with the purpose of remedying some injustice. It is an accepted principle of statutory construction that beneficial laws, remedying some injustice, should be interpreted liberally in the case of ambiguity.⁶⁸ His Honour found that the Industrial Act was a response to the recognition that the common law did not provide adequate protection against unfair dismissal for employees.⁶⁹ Accordingly, it could not be ‘read down to exclude a particular class of “employees”’ without clear provisions indicating such a purpose.⁷⁰

Related to this second argument was Kirby J’s warning against the prospect of disproportionate exercises of the power under s 40(1). Although s 40(1)(a) conferred a narrow power conditioned on the commission of an offence, ‘[r]eposing statutory and other powers in a police Commissioner is not a fail-safe guarantee that such powers will be used correctly.’⁷¹ Even within its narrow confines, an unfair or unreasonable decision could still be reached. Kirby J cited Debelle J in the Full Court of the IRC, who pointed out that the Commissioner could still make termination decisions based on minor offences such as exceeding the speed limit.⁷²

Although Gummow and Hayne JJ identified the adequacy of safeguards against unfair decision making as an indicator of exhaustiveness, their arguments on this matter are incomplete. The key issue was the efficacy of s 10(2) as a safeguard provision. Gummow and Hayne JJ needed to explain how the requirement in s 10(2) could have resulted in substantially the same outcomes as s 108 of the Industrial Act (with its ‘harsh, unjust or unreasonable’ formulation), and why this was sufficient if it was only ‘usually’ that these outcomes came about.

66 *Ferdinands* (2006) 225 CLR 130 at 158 (Kirby J).

67 *Ferdinands* (2006) 225 CLR 130 at 158 (Kirby J).

68 *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384 (Isaacs J); *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433 (Gibbs CJ). See also Pearce & Geddes, above n16 at 279.

69 *Ferdinands* (2006) 225 CLR 130 at 159 (Kirby J).

70 *Ferdinands* (2006) 225 CLR 130 at 159 (Kirby J) citing *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260–1 (McHugh J); *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291 at 293 (Mason P).

71 *Ferdinands* (2006) 225 CLR 130 at 161 (Kirby J).

72 *Ferdinands* (2006) 225 CLR 130 at 160–1 (Kirby J) citing *Ferdinands v Commissioner for Public Employment* [2004] SASC 30 at [3] (Debelle J).

Ideally, Kirby J would have responded to Gummow and Hayne JJ by incorporating an analysis of s 10(2) into his judgment to make his argument comprehensive. However, since the analysis of s 10(2) by Gummow and Hayne JJ is only cursory, Kirby J's omission does not detract from what is a convincing dissent showing the inadequacy of the Police Act's safeguards against unfair decision-making. This supports the inference that the legislature intended the Industrial Act to apply to termination decisions, in order to provide a remedy for unfair decisions.

However, the significance of the beneficial character of the Police Act cannot be conclusively determined because it is only one factor that went towards showing the intention of the legislature. Although Kirby J's dissent is convincing, it is not a comprehensive analysis of all the factors that may have been relevant to the legislature's intentions. This necessitates a focus on the approach of the majority. The most that can be said is that the problems with Gummow and Hayne JJ's approach suggest that other aspects of the enactments were important to the majority's conclusion.

(v) *Overcoming the Presumption That Both Acts Will Operate*

For the majority, the s 48 reservation was the crucial factor. While Gleeson CJ referred to it only briefly in his reasons,⁷³ Gummow and Hayne JJ explicitly found that the Police Act would not have been truly exhaustive without it.⁷⁴ For Gummow and Hayne JJ, the two enactments could have been accommodated by reading the unfair dismissal provisions as additional considerations to those that must be taken into account by the Commissioner when making a decision under s 40(1).⁷⁵

This intermediate conclusion is explained by the strong presumption, recently stated by Gaudron J in *Saraswati*,⁷⁶ that Parliament intends both enactments to operate. Gleeson CJ did not address this presumption; Gummow and Hayne JJ rebutted it, relying on two considerations which arose out of the s 48 reservation. First, the Police Act revealed an intention to deal exhaustively not only with the termination of appointment of police officers, but also with which decisions of the Commissioner were subject to review, apart from the general judicial review jurisdiction of the Supreme Court.⁷⁷ This was an application of the maxim *expressio unius est exclusio alterius*: express mention of one is the exclusion of the other.⁷⁸ Second, their Honours noted that “affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise”.⁷⁹ In other words, the affirmative words of the

73 *Ferdinands* (2006) 225 CLR 130 at 135 (Gleeson CJ).

74 *Ferdinands* (2006) 225 CLR 130 at 144–5, 148 (Gummow & Hayne JJ).

75 *Ferdinands* (2006) 225 CLR 130 at 148 (Gummow & Hayne JJ).

76 See above n20.

77 *Ferdinands* (2006) 225 CLR 130 at 148 (Gummow & Hayne JJ).

78 See *Rose v Hvic* (1963) 108 CLR 353 at 359 (Kitto, Taylor & Owen JJ).

79 *Ferdinands* (2006) 225 CLR 130 at 148 (Gummow & Hayne JJ) citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar & Kitto JJ).

Police Act, authorising the review of certain types of decisions, also had a negative force. These words also forbade the review of other decisions under the Industrial Act.

Gummow and Hayne JJ followed this conclusion with a discussion of the difficulties that would arise from having the two enactments operate together. It was suggested that this would require the ‘strange’ result that the Commission, in applying s 108 to a termination decision, have the power to decide what other form of action the conviction warranted.⁸⁰ This discussion, raised at the critical paragraph of their judgment, makes it unclear as to what was decisive in bringing about the ultimate conclusion that an implied repeal was made out: the s 48 reservation, or the practical difficulties that arise from reading the two enactments together.

The best interpretation is that the s 48 reservation was indeed decisive, and that the discussion (which is structurally out of place) was implicitly aimed at the reasons of Kirby J. In his dissent, Kirby J argued that there was no irreconcilable conflict arising from the practicalities of reading the two enactments together.⁸¹ He thus relied on the *Saraswati* presumption to deny an implied repeal.

Later in his reasons, Kirby J produced a convincing answer to the ‘strange’ result identified by Gummow and Hayne JJ. Pursuant to the making of an order for re-employment by the Commission, there is no reason why the Commissioner could not proceed to a decision proscribing a lesser form of action under s 40(1).⁸² Although the Commissioner’s original decision would not be quashed, an order for re-employment would have the same effect.⁸³ The Commissioner’s power would not be spent, as the text of s 40(1) allows ‘one or more actions’ in relation to an offence.

As Gummow and Hayne JJ had no reply to these arguments, the contention that there were difficulties in reading the enactments together loses force. However, the important point is that their joint judgment was on the decisiveness of the s 48 reservation, supported by the two characteristics of the Police Act already mentioned: its intention to deal with which decisions of the Commissioner were subject to review, and its affirmative words which also had a negative force. In *Ferdinands*, the majority found that the Police Act was intended to be exhaustive; Gummow and Hayne JJ refined the reasoning of the majority by identifying the s 48 reservation as the factor that was crucial to this finding.

D. An Erroneous Approach – Imaginative Reconstruction

It is useful to briefly examine the approach of Callinan J, who employed an imaginative reconstruction to construe the enactments. The approach is an offshoot of the purposive method, whereby the judge constructs the purpose of Parliament had it considered the application of a statute to a particular set of circumstances.⁸⁴

⁸⁰ *Ferdinands* (2006) 225 CLR 130 at 148 (Gummow & Hayne JJ).

⁸¹ *Ferdinands* (2006) 225 CLR 130 at 165–6 (Kirby J).

⁸² *Ferdinands* (2006) 225 CLR 130 at 165–6 (Kirby J).

⁸³ *Ferdinands* (2006) 225 CLR 130 at 166 (Kirby J).

It involves considering the consequences that flow from each construction that is open to the reader, and deciding which one it is likely that Parliament would have intended.⁸⁵ A High Court majority warned against the adoption of this method in *Rose v Hvriv*:

an exception from the operation of [an earlier] statutory provision ... cannot result from [a later] enactment which is not inconsistent in meaning ... even though the later enactment [would] provide ground for a conclusion that the draftsman's train of thought, if logically pursued, would have led him to enact the exception.⁸⁶

In *Ferdinands*, Callinan J found an implied repeal via this method. His reasoning in the key passage states that:

it is unlikely...that the legislature, having made express provision for a review of a termination of a probationer, or a termination...for disability or illness ... or unsatisfactory performance ...

Like Gummow and Hayne JJ, Callinan J recognised the importance of the s 48 reservation. However, there is a subtle and significant difference in his approach to it. Gummow and Hayne⁸⁷ considered the text of s 48 to find the legislative intention supporting the s 48 reservation. In contrast, Callinan J discerned the intention of Parliament through a process of putting himself in the shoes of the legislature, considering the consequences of the unfair dismissal provisions operating on termination decisions, and then 'imagining' how the legislature would have intended the enactments to be construed. Unlike orthodox methods of statutory interpretation, this reasoning is not grounded in the text of instruments that may be permissibly considered. Instead, it is based on an imaginative reconstruction of a legislative decision, as evidence of Parliament's intention. With respect, it must be said that Callinan J's approach is both unorthodox and inconsistent with the previous High Court majority in *Rose v Hvriv*.

4. Conclusion

In *Ferdinands*, a majority emerged on a slender skeleton of fundamental reasons – that the Police Act was exhaustive, and therefore inconsistent with the Industrial Act, and that there were strong grounds supporting this finding. Beyond that, the intermediate reasoning leading to this majority ratio raises questions which entangle any subsequent analysis of the case. Some of these questions have persuasive answers. The distinction between explicit and implicit contradictions should be applied; it is impermissible, when construing an enactment, to consider its subject matter standing free from its text; it is impermissible to employ an

84 William N Eskridge Jr, Phillip P Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2000) at 218–20. See also Mark Burton, 'The rhetoric of taxation interpretation and the definition of "taxpayer" for the purposes of Part IVA' (2005) 15 *Revenue Law Journal* 4 at 11.

85 Graham Hill, 'How is Tax to be Understood by Courts' (2001) 4 *The Tax Specialist* 226 at 234.

86 *Rose v Hvriv* (1963) 108 CLR 353 at 358 (Kitto, Taylor & Owen JJ).

87 *Ferdinands* (2006) 225 CLR 130 at 177 (Callinan J).

imaginative reconstruction. One question is more difficult to answer – namely, the extent to which the difficulty with reading the two Acts together affected the conclusion of the key judgment. Other questions are less important. Whether the Convention is inconsistent with s 40 of the Police Act is an enquiry that ultimately leads nowhere. The significance of the Industrial Act as beneficial legislation cannot be conclusively answered. However, these questions still remain.

In 1907, Isaacs J pointed out that '[i]t is very hard to formulate a rule which will apply to every case of implied repeal'.⁸⁸ This is because it is a matter of statutory interpretation, turning on the words of particular enactments. In this context, the internal and intermediate reasoning of implied repeal judgments is crucial in demonstrating the correct technique for later cases. *Ferdinands* reaffirms the general principles of implied repeal and gives some guidance as to the primary considerations. However, the uncertainty created by the decision's intermediate reasoning limits its usefulness as a precedent.

88 *Mitchell v Scales* (1907) 5 CLR 405 at 416–7 (Isaacs J).

