EMPLOYMENT STATUS OF THE POLICE IN AUSTRALIA

JOSEPH CARABETTA*

[A long-established rule of the common law is that police officers are not 'employees'. This article examines the origins of this rule, and argues that it is without proper foundation and also lacks modern support. The implications of the rule, particularly from the perspective of state-appointed police officers in Australia, are also discussed. The rule is presented as being not only inequitable, but also incompatible with state police officers' current (statutory) employment rights, including their rights under federal industrial laws. It is argued, however, that the current common law position ought to be re-examined not through further legislative reform, but through judicial intervention.]

CONTENTS

I INTRODUCTION

It is a well-established rule of the common law that members of the police force are not 'employees'. The Privy Council made it clear as long ago as 1955, in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*,[1] that the relationship of master and servant does not exist between the Crown and its police officers, but that police constables are independent office-holders exercising 'original authority' in the execution of their duties. Traditionally, Australian courts have

* MLLR (Hons) (Syd); Lecturer, School of Business, Faculty of Economics and Business, The University of Sydney. The idea for this article originated in a thesis submitted in partial fulfilment of the requirements for the degree of Master of Labour Law and Relations in the Faculty of Law at the University of Sydney. I would like to thank the *Melbourne University Law Review*'s anonymous referees for their helpful comments and Professor Ron McCallum for his feedback on a much earlier version of it. I also wish to thank all the legal and industrial relations practitioners who provided court submissions and background information in the lead up to some of the more recent Federal Court decisions dealt with in the article. Of course, responsibility for any errors and omissions that remain in the article rests with me alone.

[1] (1955) 92 CLR 113 ('*Perpetual Trustee*').

had very little hesitation in applying or reaffirming this rule.[2] In more recent times, however, the general issue of police officers' employment status has been the subject of much closer scrutiny by the courts, and several judges of high authority have suggested that it may be time for a review of this apparent anomaly.[3]

In Australia, as in other common law countries, the operation of the common law rule[4] has largely been modified by statute. Largely, but not entirely. In many areas, the law has undergone significant change, ensuring that police officers enjoy essentially the same protective employment and industrial rights as regular employees. In others, however, there has either been no direct attempt to resolve the uncertainties and inequities stemming from the rule or, even where this has occurred, those uncertainties have only been partially dealt with, so that the common law theory of police employment status still gives rise to a number of potential practical problems, and still produces undesirable outcomes.

In recent years, the employment status of police officers has been an important issue in a number of contexts, including termination of employment,[5] industrial matters,[6] vicarious liability,[7] and occupational health and safety.[8] The issue has been especially significant since the High Court's decision in *Re Australian Education Union; Ex parte Victoria*,[9] where it was confirmed that, in a constitutional sense, police officers are capable of being the subject of an industrial dispute. That decision was made in the context of an application, under the

[2] See, eg, *Irvin v Whitrod [No 2]* [1978] Qd R 271, 276 (Campbell J); *Sellars v Woods* (1982) 45 ALR 113, 121–2 (Fisher J); *Chapman v Australian Federal Police Commissioner* (1983) 50 ACTR 23, 33 (Kelly J).

[3] See, eg, *Ferguson v Commissioner of Police* (1997) 72 IR 145, 151 (Boon JR) ('*Ferguson*'); *Konrad v Victoria Police* (1998) 152 ALR 132, 144 (Marshall J). See also *Re Australian Federal Police Association* (1997) 73 IR 155, 158 (Boulton J, Polites SDP and Simonds C) ('*Re AFPA*') and *Minister of Police v Western Australian Union of Workers* [2000] WAIRComm 226 (Unreported, Sharkey P, Fielding SC, Scott C, 14 November 2000) [122] (Fielding SC), [128]–[129] (Scott C).

[4] In some of the state and territory police jurisdictions in Australia, certain members of the police force (most notably high-level 'executive' officers) are in fact engaged on the basis of a 'contract of employment': see, eg, *Police Service Administration Act 1990* (Qld) ss 5.3, 5.4, 5.7 ('*Qld Act*'); *Police Act 1990* (NSW) ss 27, 41–7 ('*NSW Act*'). Also, so far as the Australian Federal Police ('AFP') is concerned, there are now special provisions stating that members of that police force, with the exception of certain senior officers and special members, are to be initially engaged as 'AFP employees': *Australian Federal Police Act 1979* (Cth) ss 24, 40B, 40D ('*AFP Act*'); *Australian Federal Police Legislation Amendment Act 2000* (Cth) sch 1.

[5] See *Cook v Commissioner of Police* (1996) 66 IR 361 ('*Cook*'); *Ferguson* (1997) 72 IR 145; *Ward v Commissioner of Police* (1998) 151 ALR 604; *Konrad v Victoria Police* (1998) 152 ALR 132; *Orchard v Victoria Police* (1998) 79 IR 476; *Konrad v Victoria Police* (1999) 91 FCR 95 ('*Konrad*'); *Commissioner of Police v Ward* (1999) 165 ALR 57 ('*Ward*').

[6] See, eg, *Minister of Police v Western Australian Police Union of Workers* [2000] WAIRComm 226 (Unreported, Sharkey P, Fielding SC, Scott C, 14 November 2000); *Industrial Relations Amendment Act 2000* (WA) s 5.

[7] See *Acts Amendment (Police Immunity) Act 1999* (WA) s 5, inserting s 137 of the *Police Act 1892* (WA) ('*WA Act*'). See also *Police Regulation (Amendment) Act 1999* (Vic) s 16, inserting s 123 of the *Police Regulation Act 1958* (Vic) ('*Vic Act*'). These provisions provide protection from civil action against police officers in these states.

[8] See *Occupational Safety and Health Act 1984* (WA) s 3(4) (commencing 3 January 2004) and *Occupational Health and Safety Act 2000* (NSW) s 134, which both deem police officers to be Crown employees for the purposes of the occupational health and safety laws in these jurisdictions.

[9] (1995) 184 CLR 188 ('*Re AEU*').

former *Industrial Relations Act 1988* (Cth), by the organisation then representing members of the Australian Federal Police ('AFP') for consent to an alteration of its eligibility rules to allow it to represent police officers throughout Australia. This objective was ultimately achieved, leading to the establishment of the Police Federation of Australia. Importantly, however, the question of whether state police officers are not employees at common law, and therefore outside the scope of the federal Act, apparently played no part in the reasoning of the High Court in *Re AEU*.

It is against this background that in recent years the police authorities have been reappraising the nature of the relationship between the Crown and members of the police force. For the police unions, meanwhile, it had been hoped that the *Konrad*[10] case in the Full Federal Court might have provided a suitable vehicle for re-examining the rule that police officers are not employees. This, however, was not to be; the Court held that state-appointed police officers could access the federal termination provisions regardless of their status at common law.

A key purpose of this article is to consider the origins of, and reasoning behind, the common law doctrine that police officers are not employees. It is argued in Part II that the distinction drawn between police constables and ordinary Crown employees is not entirely sound, that *Perpetual Trustee* is open to question, and that the reasoning behind that decision was to some extent due to the judicial atmosphere in which it was made. It is also shown that we are now seeing a trend towards the recognition of police officers as both office-holders and employees, and that this view not only has a certain contemporary attractiveness but also accords with the approach that has been applied to other office-holders in Australia.

Part III of this article considers some of the implications of police officers' employment status, focusing mainly on members of the state and territory police forces. It is argued that, although the special characteristics of police service would place certain restrictions on police officers' employment entitlements, state and territory police officers could have much to gain from the establishment of a formal employment relationship. It is also suggested that this would tie in with their current employment entitlements and may even increase the effectiveness of those entitlements.

Part IV of this article considers proposals for reform. The conclusion reached is that, because of the complexity of the political issues involved, and because of the attendant technical difficulties, parliamentary intervention may only deliver partial reform and, realistically, judicial intervention is required to achieve the relevant changes to police officers' employment status.

[10] (1999) 91 FCR 95.

II THE CURRENT POSITION AND ITS ORIGINS

A *Introduction*

The linchpin in any definitive examination of the employment status of police officers in Australia is *Perpetual Trustee*.[11] In that case, the Privy Council, in considering the nature of the relationship between the Crown and a member of the police force, adopted the following proposition:

> there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original not delegated and is exercised at his own discretion by virtue of his office …[12]

Together with the earlier decision of the High Court in this case,[13] this highly unusual pronouncement has been consistently applied and reaffirmed in numerous Australian cases,[14] including a series of recent decisions.[15] The key presumption behind it is that, unlike most other public sector workers, police officers exercise special discretionary powers which they derive directly from the law itself and not indirectly by delegation from some other source, such as a minister for police. A police officer, therefore, is the servant of no-one 'save of the law itself' and 'answerable to the law and to the law alone.'[16]

The 'original powers' doctrine is drawn from British law and tradition and is supported by the pristine view of the position of the police constable as simply 'a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily.'[17] The doctrine was first introduced into Australian

11 (1955) 92 CLR 113.

12 Ibid 129 (Viscount Simonds).

13 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237.

14 *Koehne v Gay* [1964] SASR 107, 109 (Hogarth J); *Byrne v Hoare* (1965) QSR 135, 140–1 (Stable J), 149 (Gibbs J); *Firemores Transport Pty Ltd v Cluff* (1973) 2 NSWLR 303, 304 (Lord Hailsham LC, Viscount Dilhorne, Lord Wilberforce, Lord Simon and Lord Salmon); *Pense v Hemy* [1973] WAR 40, 42 (Bunt J); *Irvin v Whitrod [No 2]* [1978] Qd R 271; *Re Police Officers Industrial Agreement* [1981] AR (NSW) 272, 273 (Dey J); *Sellars v Woods* (1982) 45 ALR 113, 121–2 (Fisher J); *Re Commissioner of Police* (1982) 3 IR 132, 136–7 (Olsson J), 143 (O'Loughlin J); *Re Police Officers Award* (1982) 2 IR 397; *Chapman v Australian Federal Police Commissioner* (1983) 50 ACTR 23, 33 (Kelly J); *Griffiths v Haines* (1984) 3 NSWLR 653, 661–2 (Lee J) ('*Haines*'); *Lackersteen v Jones* (1988) 92 FLR 7, 45 (Asche CJ); *R v Commissioner of Police; Ex parte Ross* [1992] 1 Qd R 289, 291–2 (Derrington J); *Minister for Police v WA Police Union of Workers* [1995] AILR ¶13-012.

15 *Ferguson* (1997) 72 IR 145; *Re AFPA* (1997) 73 IR 155, 158 (Boulton J, Polites SDP and Simonds C); *Ward v Commissioner of Police* (1998) 151 ALR 604; *Konrad v Victoria Police* (1998) 152 ALR 132; *Orchard v Victoria Police* (1998) 79 IR 476, 478 (Marshall J); *Konrad* (1999) 91 FCR 95; *Minister of Police v Western Australian Police Union of Workers* [2000] WAIRComm 226 (Unreported, Sharkey P, Fielding SC, Scott C, 14 November 2000). These cases confirm that, at common law, a police officer is the employee of no-one, not of the Crown or of the Commissioner of Police. There are also many British cases to the same effect: see Lord Mackay (ed), *Halsbury's Laws of England*, vol 36(1) (4th ed, 1999) Police, '1 Introduction' [205].

16 *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118, 136 (Lord Denning MR).

17 J F Stephen, *A History of the Criminal Law of England* (1889) 494, quoted in United Kingdom, *Report of the Royal Commission on Police Powers and Procedure*, Cmnd 3297 (1929) [15].

law in *Enever v The King*,[18] a vicarious liability case. Along with the leading British decision of *Fisher v Oldham Corporation*,[19] that case has been the subject of widespread criticism. One of the more common criticisms is that, in focusing on the inability of the Crown to 'control' police constables in the exercise of their duties imposed by law, *Enever* is dependent on what has now become an outdated definition of employment.[20] On first thought there seems to be a certain appeal and logic to this argument. The major difficulty with it, however, is that in the case of police constables, as with certain other office-holders to which the doctrine has been applied, it has been the absence of *legal* control that has been considered significant in establishing their independent status. This is to be compared to the absence of control which, in the case of highly skilled employees, for example, stems merely from the employer's *physical* inability to control the worker's activities.[21]

It should also be noted at this point that the basic idea that police constables exercise 'original powers' in the execution of their functions has generally not been called into question in the modern cases which have dealt with the issue of their employment status. The real issue in many of these cases, rather, has been the question of whether because police constables are entrusted with such powers, the general relation between the Crown and members of the police force is not that of employer and employee. It will be seen that across the common law world the courts have given contradictory answers to this question, and in some jurisdictions the fact that police officers are entrusted with special powers by law has not prevented them from being held to be employees. In Australia, as in Britain, however, the courts have adopted a far more restrictive approach and the long-held view, reflected in the passage quoted above from *Perpetual Trustee*, has been that it follows by analogy from the original powers concept that police officers are not employees.

But how, it must be asked, did the courts come to accept such a view? The main purpose of this section will be to examine this issue. Before doing so, however, it is useful to look at some of the key statutory provisions that govern the appointment of police officers in Australia.

B *The Legislative Framework*

The starting point in any exposition of the legal status of the police in Australia must be the arrangements relating to the appointment and removal of police officers. Unlike their counterparts in localised British police forces, members of the Australian police forces are generally appointed and dismissed either by the Crown directly, or by the Commissioners of Police, with or without any direct government involvement. The Commissioners themselves are appointed and are removable by the Governor-General, Governor, Governor-in-Council or Admin-

[18] (1906) 3 CLR 969 ('*Enever*').
[19] [1930] 2 KB 364 ('*Fisher*').
[20] See, eg, *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; *Stevens v Brodribb Sawmilling Co Ltd* (1986) 160 CLR 16.
[21] This issue is adverted to generally in *Oceanic Crest Shipping Co Pty Ltd v Pilbara Habour Services Pty Ltd* (1986) 160 CLR 626 ('*Oceanic Crest Shipping*').

istrator-in-Council, as the case may be, and sometimes on the recommendation of the relevant Minister.[22] Deputy Commissioners and Assistant Commissioners are also generally appointed and removable at gubernatorial level, although in some cases this is done on the recommendation of the relevant Minister, who in turn normally acts on the advice of the Commissioner.[23] Other senior officers (variously commanders, superintendents and inspectors) are appointed and removed either by the Governor-General or Governor, sometimes on the recommendation of the Commissioner[24] or, in other cases, by the Commissioner of Police subject to government approval.[25] Finally, all non-commissioned police officers in Australia (sergeants, constables and other ranks) are appointed and removed by the relevant Commissioner of Police subject again, however, to governmental approval in some jurisdictions.[26]

Historically, as has already been noted, one of the major distinguishing features of appointment as a police officer in common law jurisdictions has been the special nature of the police officer's powers. In Australia, as in other common law jurisdictions, these powers are generally derived from statutory provisions which confer upon members of the police force the status, powers and duties of a 'constable'.[27] The effect of these provisions is to confer on the individual police officer all the powers of the ancient common law office of constable[28] and any additional statutory powers associated with that office. What is significant about these powers is that they are vested directly by law in each individual police officer. Furthermore, a number of key powers are discretionary powers, and require constables to make their own decisions about whether, for example, they have reasonable grounds to exercise a particular power.[29]

22 *AFP Act* ss 17(1), 22; *NSW Act* ss 24(1), 28(1); *Vic Act* s 4(1); *WA Act* s 5; *Police Act 1998* (SA) ss 12, 17 ('*SA Act*'); *Police Administration Act 1978* (NT) s 7 ('*NT Act*'); *Police Regulation Act 1898* (Tas) ss 8, 11, 11A ('*Tas Act*') and *Tasmanian State Service Act 1984* (Tas) pt V. In Queensland, the recommendation made by the Minister to the Governor-in-Council of an appropriate person for appointment must also be agreed to by the Criminal Justice Commission, and this also applies in relation to certain dismissals: *Qld Act* ss 4.2, 4.5.

23 *AFP Act* ss 17(1), 22; *NSW Act* ss 36(1)(a), 51(1)(a), 181D(2); *NT Act* s 7; *Interpretation Act 1978* (NT) s 34(1); *Qld Act* s 5.3; *SA Act* ss 14(1), 17(1); *Tas Act* ss 9, 9A(1); *Vic Act* s 4(2); *WA Act* ss 6, 8. In South Australia, Assistant Commissioners are appointed and removed by the Commissioner: *SA Act* ss 15(1), 17(1).

24 *SA Act* ss 20, 40, 45, 46; *Tas Act* ss 10(1), 11; *WA Act* ss 6, 8.

25 *NSW Act* ss 36(1)(b), 51(1)(b) (superintendents) and ss 64, 181 (inspectors); *NT Act* s 16(1); *Qld Act* ss 5.6, 6.1; *Vic Act* ss 8, 76(1)(g), 80(1)(e). There are sometimes additional provisions governing the removal of members of the police force, including commissioned officers, and these also generally refer to the Commissioner as the relevant disciplinary authority. Also, so far as the AFP is concerned, all remaining senior members of the force are not appointed directly as constables, but are initially engaged as 'AFP employees' by the Commissioner, who in turn is also responsible for their removal: *AFP Act* ss 24, 28, 40B, 40D, 40K.

26 *NSW Act* pt 6, div 4 and ss 179, 181D; *NT Act* ss 16(1)(a), 16(1)(aa); *Qld Act* ss 5.6, 6.1; *SA Act* ss 21, 40, 45, 46; *Tas Act* s 12; *Vic Act* ss 8, 76(1)(g), 80(1)(e); *WA Act* ss 7(1), 8. Again, special provisions apply in respect of those members of the AFP who are 'AFP employees'.

27 *AFP Act* s 9(1); *NSW Act* s 14; *Qld Act* s 3.1; *Summary Offences Act 1953* (SA) s 82; *Tas Act* s 15; *Vic Act* s 11; *WA Act* s 7(1). In the Northern Territory, members of the police force have all the powers and duties conferred or imposed upon them 'by any law in force in the Territory': *NT Act* s 25.

28 Examples of the general common law powers of a constable include the power to prevent a breach of the peace, the power to restore public order, and the power to apprehend offenders.

29 See, eg, *Criminal Code Act 1924* (Tas) s 27(2), which states that a police officer may arrest without warrant any person whom he or she 'believes on reasonable grounds' to have committed

Another striking feature of a police officer's appointment is the oath of office which police officers are required to take prior to the commencement of their duties. In Australia, all police, irrespective of rank, are upon appointment required to take an oath, or make an affirmation, in the following form:

> I, AB, do swear that I will well and truly serve our Sovereign in the office of constable … and that I will, to the best of my power, without favour or affection, malice or ill-will, cause the peace to be kept and preserved, and prevent all offences against the persons and properties of the Sovereign's subjects; and that while I continue to hold the said office I will, to the best of my ability, skill, and knowledge, discharge all the duties thereof faithfully according to law. So help me God.[30]

It is significant also that all Commissioners of Police in Australia are accountable either to a Minister for Police (or some other ministerial officer), or to a Governor-in-Council. The *Police Regulation Act 1958* (Vic), for example, provides that:

> The Chief Commissioner shall have, subject to the directions of the Governor in Council, the superintendence and control of the force ...[31]

Only in Western Australia has no such provision been made, but the Governor-in-Council and the Minister have certain other powers, including, for example, the right to approve regulations for the general government of the police force.[32]

The main power held by all Australian Commissioners of Police is the general control of the operations and management of the police.[33] In order to fulfil this responsibility, the Commissioners also have a number of additional powers. Most Commissioners are authorised to make general or specific orders and instructions with respect to the control and management of the police, or for the effective and efficient conduct of police operations.[34] The Western Australian Commissioner of Police may, subject to the approval of the Minister, make rules, orders and regulations for the general government of the police force.[35] The Queensland Commissioner of the Police Service may issue directions where

certain offences. See also Rudolf Plehwe and Roger Wettenhall, 'Policing in Australia: An Historical Perspective' (Paper presented at the National Conference on Keeping the Peace: Police Accountability and Oversight, Sydney, 20–21 May 1993) 5.

30 *Tas Act* s 16, sch 2, form 1; and, similarly, *AFP Act* s 36; *Australian Federal Police Regulations 1979* (Cth) sch 1, form 2; *NSW Act* s 13; *Police Service Regulation 2000* (NSW) reg 8; *NT Act* s 26, sch, forms 1, 2; *Qld Act* s 3.3; *SA Act* ss 25, 60; *Police Regulations 1999* (SA) reg 72, sch 1; *Vic Act* s 13(1), sch 2, form A; *WA Act* s 10. In some jurisdictions, there are also provisions stating that, upon taking the oath of office, police officers shall be deemed 'to have … thereby entered into an agreement with, and shall be thereby bound to serve Her Majesty': *Vic Act* s 13(3); see also *NT Act* s 28; *SA Act* s 26; *Tas Act* s 18.

31 Section 5; see also *AFP Act* s 37(2); *NSW Act* s 8(1); *NT Act* s 14(2); *Qld Act* s 4.6(2); *SA Act* s 6; *Tas Act* s 8.

32 *WA Act* ss 6–9.

33 *AFP Act* s 37(1); *NSW Act* s 8(1); *NT Act* s 14(1); *Qld Act* ss 4.6(2), 4.8; *SA Act* s 6; *Tas Act* s 8(2); *Vic Act* s 5; *WA Act* s 5.

34 *AFP Act* s 38; *NSW Act* s 8(4); *Police Regulations 1974* (Tas) reg 37(a); *SA Act* s 11; *Vic Act* s 17(1).

35 *WA Act* s 9.

desirable or necessary for the efficient and proper functioning of the police service.[36]

As well as the general powers noted above, in each jurisdiction there are also a number of additional provisions relating to the control and discipline of police officers. Of particular significance is the requirement that members obey all 'lawful orders' from superior officers.[37] It is not altogether clear, under the terms of these provisions, what the precise scope of a 'lawful order' might be. What is clear, however, is that even on a narrow interpretation, a lawful order would be one that relates to the general common law and statutory duties of a police officer.

Finally, in each jurisdiction there are broad regulation-making powers in relation to the police force. In New South Wales, Queensland and South Australia the Governor is authorised to make regulations dealing with a wide range of issues concerning the management and control of the police.[38] In Victoria, Tasmania and the Northern Territory the Governor-in-Council or Administrator-in-Council is empowered to make regulations for, inter alia, the general government and discipline of the police and to give effect to police legislation.[39] Similar provisions also apply in respect of members of the AFP.[40]

C *The Common Law Theory of Police Employment Status*

1 *The 'Original Powers' Doctrine*

The principle that police constables exercise 'original powers' in the discharge of their functions can be traced back to British law. Its presence in Australian law, where it has also been extended to other office-holders, is due to the decision of the High Court in *Enever*.[41]

Enever concerned the legal relationship between the Crown, as represented by the executive government of Tasmania, and a police constable appointed under the terms of the *Police Regulation Act 1898* (Tas). The specific question raised was whether a police constable endowed with authority to arrest by statute[42] was in the supposed exercise of that authority acting as an 'officer, agent or servant' within the meaning of the *Crown Redress Act 1891* (Tas). It was not disputed that the police constable was himself liable for the wrongful arrest. Rather, the central issue was whether the government could also be held liable. The Court identified the key issue as being whether the police constable was under these circumstances a servant of the government in such a sense that the maxim *respondeat*

36 *Qld Act* s 4.9.

37 See, eg, *Police Service Regulation 2000* (NSW) pt 2, regs 9(1), (4).

38 *NSW Act* s 219; *Qld Act* s 10.28; *SA Act* s 76.

39 *Vic Act* s 130; *Tas Act* s 29; *NT Act* s 167.

40 *AFP Act* s 70.

41 (1906) 3 CLR 969. For a critique on the origins of *Enever*, see S C Churches, '"Bona Fide" Police Torts and Crown Immunity: A Paradigm of the Case for Judge Made Law' (1980) 6 *University of Tasmania Law Review* 294.

42 At the time of the decision, the relevant power to arrest was contained in the *Police Act 1865* (Tas) s 197. It authorised a police constable to arrest 'any person who within his view … disturbs the public peace'.

superior could be applied. In answering this question, all three members of the Court (Griffith CJ, O'Connor and Barton JJ) emphasised the absence of control by the 'employer' — that is, the executive government of the state. Griffith CJ said, in a key passage to which I shall return shortly, that 'the powers of a constable, qua peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office' and are strictly personal in nature.[43]

The result of the application of these principles[44] was that the Crown could not be held liable for the constable's wrongful arrest, since *on this occasion* the constable had not been performing a function which had made him a servant in the relevant sense. Another significant aspect of *Enever*, however, was that in arriving at that conclusion, the Court also made a number of important observations about the nature of the relationship between the Crown and a member of the police force.

Of particular significance are the judgments of Griffith CJ and O'Connor J, which reveal some interesting variations in approach regarding this issue. Griffith CJ drew heavily upon the historical common law position of a constable and the special nature of the constable's office. He pointed out that:

> At common law the office of constable or police officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by Statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular Statute.[45]

In considering 'whether the party sought to be made responsible retained the power of controlling the act',[46] Griffith CJ went on to state that:

> the powers of a constable, qua peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. … Moreover, his powers being conferred by law, they are definite and limited, and there can be no suggestion of holding him out as a person possessed of greater authority than the law confers on him. … A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.[47]

These comments have been confirmed and applied in a number of decisions which have held that police constables are not employees.[48] They have also been deliberated on and generally approved of in various police Royal Commission

[43] *Enever* (1906) 3 CLR 969, 977.
[44] The judgments in *Enever* had relied to a large extent on *Tobin v The Queen* (1864) 16 CB NS 310; 143 ER 1148.
[45] *Enever* (1906) 3 CLR 969, 975.
[46] Ibid 977.
[47] Ibid.
[48] Most notably in *Fisher* [1930] 2 KB 364 and *Perpetual Trustee* (1955) 92 CLR 113.

reports.[49] It might be argued, however, that these conclusions were far more sweeping than what was required in the case. The Court was, after all, primarily concerned with the constable's statutory powers of arrest, and not any other aspect of a police officer's appointment. Furthermore, it is significant that in reaching the conclusion that the 'general law of agency has no application', Griffith CJ made no direct reference to the relevant statutory provisions governing the appointment of the 'modern' Tasmanian police constable. In particular, he made no reference to the provisions which place members of the police force under the authority of the Commissioner of Police, nor to those suggesting that the Crown has ultimate control over the police force.

O'Connor J's judgment also proceeded on the basis of the 'original powers' concept. In contrast to Griffith CJ, however, O'Connor J's conclusion was based on the view that although the police constable was a servant 'in a general sense',[50] in the exercise of the particular act complained of he could not fall within that category. In relation to the first point, his Honour said that the constable

> held his office under the [Tasmanian] *Police Regulation Act 1898*, which gave the Government power to employ, to pay, and to dismiss him. He was probably required to perform many duties besides those imposed upon a constable at common law and by Statute, and in the performance of such duties he would be the servant of the Government, and they would be directly liable for any neglect or default committed by him in the course of his employment …[51]

Even if it can be assumed that the 'original powers' doctrine is valid, it will be seen from the differing approaches of Griffith CJ and O'Connor J above that *Enever* itself revealed some uncertainty as to the proper *scope* of that doctrine. What also becomes apparent from an analysis of the judgments in that case, however, is that much like O'Connor J, Barton J also appeared to be of the view that police officers might be employees in the 'general sense'.[52] It would seem, therefore, that the decision in *Enever* does not support the proposition that police officers are not Crown employees. Indeed, there seems to be a suggestion in that case that police officers are employees, a suggestion that, as will be seen later, is repeated in a number of more recent (but mainly non-police) decisions.

Apart from *Enever*, another decision which has been crucial to the development of the 'original powers' theory is *Fisher*,[53] also a vicarious liability case. In

[49] See especially United Kingdom, *Royal Commission on the Police 1962 Final Report*, Cmnd 1728 (1962) [62].

[50] *Enever* (1906) 3 CLR 969, 990.

[51] Ibid.

[52] See *Enever* (1906) 3 CLR 969, 981, where Barton J states that whether 'the constable was acting as an officer, agent or servant of the Government is not the only question; though the constable might be an officer, agent or servant of the Government, he would still have to be such within the meaning of the [Tasmanian] *Crown Redress Act 1891* before the liability could attach.' Barton J (at 982) also points out that the fact that the police constable was an office-holder was not open to question, but that that did not conclude the matter in the Crown's favour.

[53] [1930] 2 KB 364. *Fisher* has been trenchantly criticised, particularly in the police governance literature in Britain: see especially Laurence Lustgarten, *The Governance of Police* (1986) 55–61, where Lustgarten endorses the earlier criticisms made by Geoffrey Marshall, *Police and Government: The Status and Accountability of the English Constable* (1965).

that matter, it was held that the police, although appointed, paid and removable by a municipal corporation through its watch committee, were not, as such, servants of the corporation.[54] McCardie J cited various British decisions[55] and, inter alia, some earlier American[56] and Canadian[57] authorities, in support of this view. His Honour's main emphasis, however, was on the passage from the judgment of Griffith CJ in *Enever* to the effect that police constables, when carrying out their peacekeeping duties, exercise original, and not delegated authority.[58]

There are a number of important points that need to be made about *Fisher*. In the first place, it should be noted that although McCardie J placed extensive reliance on the comments of Griffith CJ in *Enever*, he also described each of the remaining judgments in that case as 'most weighty and most instructive'.[59] He did this, however, without noting any of the major variations in the High Court's approach. In other words, he seemed to make the assumption that, like Griffith CJ, the remaining members of the Court had also adopted the view that police officers were not employees.

Secondly, a further strand of the *Fisher* judgment, which McCardie J sought to combine with the 'original authority' argument from *Enever*, involved the case of *Stanbury*.[60] In that case, which had also been referred to (but only partially applied) in *Enever*, Wills J had commented that:

> This case is, to my mind, almost exactly analogous to the case of a police officer. In all boroughs the watch committee by statute has to appoint, control, and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties. I think that the reason why that is so … is expressed in the passage quoted in [the second edition of] *Beven on Negligence*. … If the duties to be performed by the officers appointed are of a public nature and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security which affect the whole kingdom …[61]

Two comments may be made about this quotation. Focusing firstly on the latter portion of the passage, it can be seen that the reason for the rule of non-liability stated by Wills J had nothing to do with whether the employing authority could 'control' its police constables.[62] The second point is that although it is clear that McCardie J had relied upon *Stanbury* as authority for the proposition

54 *Fisher* [1930] 2 KB 364, 371, 377–8 (McCardie J).

55 *Mackalley's Case* (1611) 9 Co Rep 61b; 77 ER 824; *Coomber v The Justices of the County of Berks* (1883) 9 App Cas 61; *Stanbury v Exeter Corporation* [1905] 2 KB 838 ('*Stanbury*').

56 *Buttrick v City of Lowell*, 83 Mass 172 (1861).

57 *McCleave v City of Moncton* (1902) 32 SCR 106.

58 *Fisher* [1930] 2 KB 364, 372.

59 Ibid.

60 [1905] 2 KB 838.

61 Ibid 842–3 (citations omitted).

62 Rather, the principle being applied here, which originated in a series of American and Canadian decisions, was one which had also been extended to other public officials: see Dermot Walsh, 'The Legal Status of an Irish Police Officer: New Clothes for the Ancient Office of Constable' [1994] *Anglo-American Law Review* 23, 63, 85–6; Philip Stenning, *Legal Status of the Police: A Study Paper Prepared for the Law Reform Commission of Canada* (1982) 101–12.

that police constables were office-holders *and nothing more*, it is not entirely certain whether that decision was based on the point that the officer in question was not a servant but a statutory office-holder, or whether it rested on the view that, although a servant, the particular act complained of was performed pursuant to his duties as a statutory official.[63] These are two distinct, but related, questions which, as has already been noted in relation to McCardie J's analysis of *Enever*, his Honour seemed to ignore in his judgment in *Fisher*.

Finally, another factor which McCardie J singled out as justifying his decision in *Fisher* related to the apparent division of a British constable's engagement between local and central authority, and 'the fullness of central administrative control.'[64] He strongly emphasised the fact that, in a number of areas, the United Kingdom's *Municipal Corporations Act 1882*, 45 & 46 Vict, c 50 gave 'but limited' or 'shared' powers to the watch committee of the defendant corporation, as compared with those of other governing authorities, including the Home Secretary.[65] As will become clear, this issue is of considerable importance in assessing the subsequent Australian case law on police employment status.

2 *The* Perpetual Trustee *Cases*[66]

Perpetual Trustee[67] concerned an action for the loss of services of a member of the New South Wales police force caused by the negligent act of another under the cause of action *per quod servitium amisit*.[68] Because of the similarities between the military service of the Crown and service in the police force, it was held, following the earlier decision of the High Court in *Commonwealth v Quince*,[69] that the action could not lie in the case of a police constable.[70] Once again, however, a further issue which had been raised in this case concerned the nature of the relationship between the Crown and members of the police force.

Viscount Simonds delivered the judgment of the Privy Council. Before addressing the main point in the case, relating to the scope of the action *per quod servitium amisit*, his Lordship cited the relevant statutory provisions applying under the *Police Regulation Act 1899* (NSW). With a few exceptions, those provisions are indistinguishable from the provisions of the current *Police Act 1990* (NSW). After highlighting the references in the Act to the 'office of constable', and referring extensively to the decisions in *Enever* and *Fisher*, his Lordship observed that:

63 Paul Atiyah, *Vicarious Liability in the Law of Torts* (1967) 77–8.

64 [1930] 2 KB 364, 368; see also 368–71 (McCardie J).

65 Ibid 370–1.

66 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 (High Court of Australia); *Perpetual Trustee* (1955) 92 CLR 113 (Privy Council).

67 (1955) 92 CLR 113.

68 This is an action for damages by a person entitled to services from an injured party, against another person whose wrongful act towards the injured party has deprived him or her of those services.

69 (1944) 68 CLR 227.

70 The High Court had earlier reached the same conclusion: *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237.

> No doubt great changes have been made which are reflected in the organization of the police force in New South Wales today, but the substantial change was made long before *Enever's Case* was decided in Australia or *Fisher's Case* in England, and those cases show convincingly that neither changes in organization nor the imposition of ever-increasing statutory duties have altered the fundamental character of the constable's office.[71]

His Lordship then referred to the provisions relating to the constable's 'oath', saying that in such a context the use of the word 'serve' is of negligible significance and that, on the other hand, the oath 'is not the usual concomitant of the master and servant relationship.'[72] Later in the judgment he presented the Privy Council's final conclusions on the case, and made the following, now famous, remarks:

> there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original not delegated and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.[73]

It will be seen that the Privy Council's views on the special character of the police constable's office are consistent with the earlier observations of Griffith CJ in *Enever*. Those observations had also commended themselves to McCardie J in *Fisher* as applying to the position of a British police constable. Prior to the Privy Council decision in *Perpetual Trustee*, three of the five majority members of the High Court had reached the same conclusion on the character of the police officer's appointment,[74] as had the NSW Supreme Court below.[75] In the High Court, Kitto J, after referring to, amongst other cases, *Enever* and *Ryder v Foley*,[76] said:

> The matter may be summed up by saying that a member of the police force is under an obligation to perform duties of which some are statutory, some derive from the common law, and all are of a public character; and although a member of the police force is bound to obey the lawful orders of his superiors (s 14), neither they nor the Crown itself can lawfully require him to abstain from performing the duties which the law imposes upon him with respect to the preservation of the peace and the apprehension of offenders, or can lawfully direct the detailed manner in which he shall perform those duties, and neither they nor the Crown itself … can be held liable for acts done by a constable in relation to the duties of his office. *These considerations seem to me sufficient in themselves to negative the existence of a master and servant relationship.*[77]

71 *Perpetual Trustee* (1955) 92 CLR 113, 120–1 (citations omitted).
72 Ibid 121.
73 Ibid 129.
74 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 273 (Webb J), 303–4 (Kitto J), 255–6 (McTiernan J).
75 *A-G (NSW) v Perpetual Trustee Co Ltd* (1951) 51 SR (NSW) 109, 112–3 (Maxwell J), 117 (Owen J).
76 (1906) 4 CLR 422.
77 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 303–4 (emphasis added).

Webb and McTiernan JJ also reached the conclusion that 'the Crown and the policeman were not master and servant in the legal sense.'[78] McTiernan J reached that conclusion strictly on the basis of the *Police Regulation Act 1899* (NSW).[79] Webb J, on the other hand, referred specifically (and solely) to the judgments of Griffith CJ and O'Connor J in *Enever*, remarking that:

> A police constable has always been an arm of the law and never a servant employed to do a master's bidding on all occasions and in any circumstances. His authority is original, and not derived from a master or exercised on behalf of one, but is exercised on behalf of the public …[80]

It is submitted, with respect, that this conclusion cannot be drawn from the cases or statutory provisions relied on. So far as the authorities are concerned, the only decision which, if relevant, might support such a view is that of McCardie J in *Fisher*. As noted above, however, that decision was concerned with the non-liability of a municipal employer of police under a localised British policing system. It seemed that a determinative ground for the decision was the fact that many of the terms and conditions governing the appointment and operation of the police were controlled by central government, rather than by the watch committee as the authority responsible for appointing police constables. It is difficult to argue, in view of these factors, that the judgment could have any real relevance in Australia where all police forces are governed under centralised structures, or where there is no organisation standing between the Crown and its police officers.

This leaves only the High Court's decision in *Enever* as support.[81] But that decision, properly understood, does not support the view that police officers cannot be regarded as Crown employees. *Enever* provides only partial support for such a view, but equally points to the fact that a police officer (in respect of some duties at least) is in the same position as an ordinary employee.[82] This is expressly acknowledged in the obiter remarks of Dixon and Fullagar JJ and in the dissenting judgment of Williams J.[83] It is also acknowledged in a number of High Court decisions in which the *Enever* doctrine has been applied[84] and, indirectly, in certain overseas decisions concerning police officers.[85] There is a clear suggestion in these cases that *Enever* turned not on the presence or absence of a master-servant relationship *as such*, but on the question of whether, in the exercise of the 'independent' powers conferred upon the police officer by law,

78 Ibid 255 (McTiernan J).
79 Ibid 254–6.
80 Ibid 273.
81 It is submitted that *Ryder v Foley* (1906) 4 CLR 422, which had been referred to by Kitto J, does not support the proposition that police constables are not employees.
82 Zelman Cowen, 'The Action *Per Quod Servitium Amisit* and the Police' (1953) 2 *University of Western Australia Annual Law Review* 263, 276.
83 *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 283 (Fullagar J), 252 (Dixon J), 265 (Williams J).
84 See especially *Field v Nott* (1939) 62 CLR 660 (legal aid officer) and *Oceanic Crest Shipping* (1986) 160 CLR 626 (marine pilot).
85 See *Union Government v Thorne* [1930] SALR 47; *Sibiya v Swart* [1950] 4 SALR 515; *Mhlongo v Minister of Police* [1978] 2 SALR 551; see also Churches, above n 41, 300.

particularly his power of arrest, the police constable concerned was acting in the course of his employment by the Crown.

Insofar as the statutory framework is concerned, it is true that all of the incidents of the relationship between a police officer and the Crown, including the power of the Crown and of senior officers to control and discipline police officers, are determined by law and not by agreement. It is also true that at the time of *Perpetual Trustee*, as now, the words 'office' and 'appointment', and the expression 'member of the police force', were used significantly throughout the relevant statutory provisions. It might therefore be reasonable to deduce a legislative intention that members of the police force should be viewed as office-holders in the full sense and not as employees. There are, however, a number of countervailing factors which, it is submitted, are sufficient to establish that police officers and the Crown are in an employment relationship.

Of particular significance are the provisions stating that the Commissioner's superintendence of the police force is 'subject to the direction of the Minister'.[86] No specific reference was made to these provisions when the Privy Council decided *Perpetual Trustee*. In the High Court, on the other hand, Kitto J, after drawing the conclusion from *Enever* that police officers were not employees, noted that the ultimate direction of the police force was vested by these provisions not in the Crown, but in the Minister.[87] However, most modern public sector statutes in Australia vest the administration of their provisions in a Minister, and it is difficult to see why the position should be all that different for this purpose for the modern police organisation. Although the provisions surely do not diminish the police constable's traditional common law and statutory duties, they must have at least some implications for how police conduct their activities.[88]

There would also seem to be a strong case for interpreting the provisions relating to the internal management of the police force — including those relating to the Commissioner's powers of superintendence and control over members — as indicators of employee status for police. As with the provisions relating to executive control over the police force, the difficulty with these provisions lies in trying to determine precisely what kinds of restrictions they might impose upon constables given their independent status as office-holders. But again, it cannot reasonably be said that because police constables have certain discretionary powers to perform that these provisions can therefore have no overall effect on their functions.[89] Clearly they must have some impact on police activities, particularly in broader policy-making areas. The problem with the generalised approaches in *Perpetual Trustee* and *Attorney-General (NSW) v Perpetual Trustee Co Ltd*, however, is that nowhere was any particular

[86] *NSW Act* s 8. At the time of *Perpetual Trustee* and *A-G (NSW) v Perpetual Trustee Co Ltd*, the relevant provision was s 4(1) of the *Police Regulation Act 1899* (NSW).

[87] *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 304.

[88] *Haines* [1984] 3 NSWLR 663, 661 (Lee J).

[89] Marshall, above n 53, 18–20; Walsh, above n 62, 90–7; Plehwe and Wettenhall, above n 29, 5–7.

attention paid to these kinds of provisions, and so nowhere was the duality in the role of the police constable recognised.

The authority of *Perpetual Trustee* is also undermined by the presence, at the time of that decision, of s 10 of the *Police Regulation Act 1899* (NSW). That section provided that every person taking the oath of office shall be deemed:

> to have thereby entered into a written agreement with and shall be thereby bound to serve Her Majesty as a member of the police force and in the capacity in which he has taken such oath, at the current rate of pay for such member, and from the day on which such oath has been taken and subscribed until legally discharged: Provided that … no such agreement shall be set aside, cancelled, or annulled for want of reciprocity …

The Privy Council did make some mention of this section at the outset of its judgment in *Perpetual Trustee*, stating that the fact that a constable was bound to 'serve Her Majesty' was in no way conclusive.[90] It seems rather odd, however, that the provision was left standing in this way. The provision itself seems to suggest that, upon taking their oath of office, police officers enter into an employment contract, the nature of which is the same as is ordinarily entered into by Crown servants, namely a contract which enables termination at the Crown's pleasure.[91] Indeed, there have been a number of High Court decisions which have considered these kinds of provisions,[92] and although the issue of police employment status was not crucial to the outcome in these cases, it seems significant that the conclusions were based on the assumption that police officers were employees.

Whether the action *per quod servitium amisit* is out of harmony with modern conditions, and whether it should be applied to police constables, are questions which are beyond the scope of this article. It does, however, seem unfortunate that it was against this background that the question of whether police officers could be employees was decided. The action for loss of services was seen in *Perpetual Trustee* and *Attorney-General (NSW) v Perpetual Trustee Co Ltd* as applicable to a private, essentially domestic, master-servant relationship, and one having little to do with modern employment relationships.[93] Furthermore, what became clear, especially from the Privy Council's judgment, was the marked judicial aversion to the action and the strong desire not to extend it to the loss of service 'of one who … is the holder of an office which has for centuries been

[90] (1955) 92 CLR 113, 118.

[91] *Fletcher v Nott* (1938) 60 CLR 55, 68 (Latham CJ).

[92] *Ryder v Foley* (1906) 4 CLR 422; *Fletcher v Nott* (1938) 60 CLR 55; *Kaye v A-G (Tas)* (1956) 94 CLR 193. To similar effect are the decisions of the Supreme Court of Victoria in *Power v The Queen* (1873) 4 AJR 144, followed in *Green v The Queen* (1891) 17 VLR 329, 332 (Higinbotham CJ); *Bertrand v The King* [1949] VLR 49, 50–1 (Herring CJ); *O'Rourke v Miller* [1984] VR 277, 298–9 (O'Bryan J). See also *Martin v Police Service Board* [1983] 2 VR 357, 367 (Marks J); *Kochne v Gay* [1964] SASR 107, 109 (Hogarth J); *Re Commissioner of Police* (1982) 3 IR 132, 137 (Olsson J); *Finemores Transport v Cluff* (1973) 2 NSWLR 303, 304 (Lord Hailsham LC, Viscount Dilhorne, Lord Wilberforce, Lord Simon and Lord Salmon); *Alley v Minister of Works* (1974) 9 SASR 306, 310 (Zelling J).

[93] Louis Waller, 'The Police, the Premier and Parliament: Governmental Control of the Police' (1980) 6 *Monash University Law Review* 249, 261, referring to the High Court's decision.

regarded as a public office'.[94] It is therefore not surprising that very little attention was paid to the relevant statutory framework and that, once again, the main focus of the two decisions was on the police constable's office.[95]

D *A Preferred Approach*

As noted above, three members of the High Court in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*[96] had expressed opinions consistent with the view that police officers were employees. Dixon J was emphatic on this point. After referring to a number of the key provisions of the *Police Regulation Act 1899* (NSW), he said: 'So far I should have thought that everything pointed to a member of the police force occupying the position of a servant of the Crown for the loss of whose services … the Crown might sue the wrongdoer.'[97] His Honour then added:

> But the question remains whether because a constable is entrusted by law with specific powers and given specific duties which he must execute as a matter of independent responsibility, the general relation between the Crown and a member of the police force is not that of master and servant. In my opinion this consequence does not follow. In most respects a member of the police force is subject to the direction and control which is characteristic of the relation of master and servant. It does not matter that there is a chain of command. That is necessary in some degree in all organizations military and civil, public and private. It is only when in the course of his duties as a servant of the Crown he is confronted with a situation involving the liberty or rights of the subject that the law places upon him a personal responsibility of judgement and action.[98]

In essence, the approach taken by Dixon J in the above passage is that although a police officer has duties to perform which are derived directly from the law itself and require individual judgment and action,[99] that fact does not, by itself, preclude him or her from being regarded as an employee. It is suggested that this approach, which has drawn strong judicial[100] and other[101] support, provides a far more realistic and logical view of a police officer's employment status in Australia, and that it is therefore the approach to be preferred.

94 *Perpetual Trustee* (1955) 92 CLR 112, 130.

95 It is clear from the judgments of some members of the High Court that the fact that police constables have always had independent peacekeeping functions to perform was, of itself, conclusive.

96 (1952) 85 CLR 237, 252 (Dixon J), 265 (Williams J), 278, 283–4 (Fullagar J).

97 Ibid 252.

98 Ibid (citations omitted).

99 Such as the constable's powers of arrest.

100 *Haines* [1984] 3 NSWLR 653, 658 (Lee J); *Konrad v Victoria Police* (1998) 152 ALR 132, 144 (Marshall J).

101 Peter Hogg, *Liability of the Crown* (1st ed, 1971) 106, 163; Peter Hogg, *Liability of the Crown* (2nd ed, 1989) ch 5; Michael Bersten, 'Police and Politics in Australia: The Separation of Powers and the Case for Statutory Codification' (1990) 14 *Criminal Law Journal* 302, 312; Enid Campbell and Harry Whitmore, *Freedom in Australia* (1973) 21–2; Waller, above n 93, 261–2; Greg McCarry, *Aspects of Public Sector Employment Law* (1988) 214; John Fleming, *The Law of Torts* (9th ed, 1998) 753.

Furthermore, it is clear from the remarks made in various court decisions,[102] and particularly in some of the recent cases on the status issue,[103] that there is widespread support for some general notion of a dual status for police officers in Australia. Indeed, it might be said that the High Court itself, through its 1986 decision in *Oceanic Crest Shipping*,[104] has formally endorsed the view that police officers ought to be regarded as both office-holders and employees.[105] It also cannot be denied that, as well as the extensive powers of control exercised over members of the police force,[106] there are many other aspects of their engagement that are indicative of an employer-employee relationship between them and the Crown.[107] Such factors include the powers relating to suspension and dismissal, the right to demand exclusive service, the high level of organisational integration, the permanency of appointment, and various other employment criteria.[108] The presence of such factors also provides a compelling reason for police officers to be classified as both office-holders and employees.

Finally, it has been said that, ultimately, the lack of an employer-employee relationship between police constables and the Crown rests on the important constitutional principle that, in Britain, the police 'are not under the direct control of the central government … This is an important facet of the constitution, and a prime safeguard against the evils of the police state.'[109] A move to a dual status relationship for the police, however, would not alter the discretionary powers conferred upon them by law.[110] Nor would it affect the independence of police constables. It would therefore not involve any 'grave and most dangerous constitutional change'.[111] This would be so even if the broad approach put forward by Dixon J in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*[112] were adopted.

[102] See *Little v Commonwealth* (1947) 75 CLR 94, 114 (Dixon J); *Ramsay v Pigram* (1968) 118 CLR 271, 279–80 (Barwick CJ), 289 (Windeyer J) (discussing governmental liability for a police officer's negligent driving); *Haines* [1984] 3 NSWLR 653, 658, 663 (Lee J).

[103] See *Ferguson* (1997) 72 IR 145, 151 (Boon JR); *Re AFPA* (1997) 73 IR 155, 158 (Boulton J, Polites SDP, Simmonds C); *Konrad v Victoria Police* (1998) 152 ALR 132, 144 (Marshall J); *Konrad* (1999) 91 FCR 95, 127 (Finkelstein J); *Minister of Police v Western Australian Union of Workers* [2000] WAIRComm 226 (Unreported, Sharkey P, Fielding SC, Scott C, 14 November 2000) [122] (Fielding SC), [128]–[129] (Scott C).

[104] (1986) 160 CLR 626.

[105] This is seen most clearly in the judgment of Dawson J, which drew a direct analogy between the position of a marine pilot, as both office-holder and employee, and that of the police constable: ibid 681.

[106] *Re Australian Federal Police Association [No 2]* (1993) 51 IR 122, 146 (Williams DP) ('*Re AFPA [No 2]*'); *Re AFPA* (1997) 73 IR 155, 158 (Boulton J, Polites SDP, Simmonds C).

[107] *Re AFPA* (1997) 73 IR 155, 158 (Boulton J, Polites SDP, Simmonds C); *Konrad v Victoria Police* (1998) 152 ALR 132, 144 (Marshall J).

[108] These issues were discussed in some detail in the submissions of the applicants in *Konrad v Victoria Police* (1998) 152 ALR 132: Applicant's Submissions on Crown Employee Point, No 1339, 1340 and 1406 of 1997 (27 October 1997) 21–34.

[109] J R L Milton, 'The Vicarious Liability of the State for the Delicts of the Police' (1967) 84 *South African Law Journal* 25, 27, quoting William Wade, *Administrative Law* (1961) 24–5.

[110] Cf Sir William Wade, *Administrative Law* (6th ed, 1988) 148, referring to some of the South African decisions mentioned in above n 85.

[111] *Fisher* [1930] 2 KB 364, 378 (McCardie J).

[112] (1952) 85 CLR 237, 252.

III Some Implications of Police Employment Status

A *Operation of the* Workplace Relations Act 1996 *(Cth)*

1 *Industrial Disputes: Awards/Certified Agreements*

Having regard to the decision of the High Court in *Re AEU*,[113] it must now be taken as established in Australia that the Commonwealth Parliament is able to legislate with respect to the prevention and settlement of industrial disputes involving members of the state and territory police forces. The (ultimate) effect of the High Court's decision was the creation of a national umbrella police union named the Police Federation of Australia ('PFA'). The details of the PFA's new eligibility rules and its status as a registered organisation of employees will be considered shortly. For present purposes, however, it is important to note that, despite these developments, under the *Workplace Relations Act 1996* (Cth) ('*WR Act*') the term 'industrial dispute' is limited to 'matters pertaining to the relationship between *employers* and *employees*'.[114] This means that since police officers in the Australian state and territory systems are not employees under the general law, disputes about matters relating to their terms of engagement cannot come within the traditional provisions of the *WR Act*.[115]

But let us suppose that all police officers in Australia were to have a contract of employment. Would this allow police members in the state jurisdictions and their associations to notify industrial disputes and seek awards under Part VI of the *WR Act*?[116] Of course, in considering the significance of this question, it must be remembered that the role of arbitrated awards is now a restricted one under the *WR Act*, with industrial disputes being confined, for most purposes, only to certain 'allowable' matters.[117] On the other hand, it is also crucial to note that, although basic terms and conditions of engagement in the state police forces are dealt with by the ordinary tribunals in most cases, traditionally the common pattern has been for many employment conditions to be regulated by detailed statutory provisions or regulations determined at state level. It seems valid to assume, therefore, that access to the federal industrial tribunal for state-based police, as well as, perhaps, providing the scope for a more 'scientific' and coordinated approach to the regulation of police salaries and other employment

113 (1995) 184 CLR 188.

114 Section 4(1) (emphasis added).

115 Police officers in Victoria, however, have access (subject to certain limitations) to the general award-making provisions of the *WR Act*: *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) s 3; *WR Act* ss 489, 493.

116 This issue was explicitly raised during argument in *Glasgow v Victoria*, an unsuccessful application for removal to the High Court under s 40(1) of the *Judiciary Act 1903* (Cth): see Transcript of Proceedings, *Glasgow v Victoria* (High Court of Australia, Gavan Griffith, 11 September 1998). The matter involved was originally tried by Marshall J in *Orchard v Victoria Police* (1998) 79 IR 476, but subsequently overruled by the Full Federal Court decision in *Konrad* (1999) 91 FCR 95.

117 *WR Act* s 89A.

conditions in the state systems,[118] could also potentially broaden the range of matters that may be award-regulated within these jurisdictions.

However, access to the award-making mechanisms of the *WR Act* may not become available to members of the state and territory police forces simply by introducing a contract. This is because, as has been highlighted in a number of commentaries on the *WR Act*,[119] that Act now places substantial limitations on the Australian Industrial Relations Commission ('AIRC') when dealing with disputes where some or all of the employees involved are already covered by state awards or agreements. In particular, s 111AAA(1) of the *WR Act*, which is mandatory in effect, states that the AIRC must cease dealing with an industrial dispute in circumstances where a 'State award or State employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute.'

In light of these considerations, perhaps a preferred option for police officers, were they to be classified as employees, would be to seek a certified agreement under Division 3 of Part VIB of the Act.[120] One of the advantages in pursuing this kind of strategy would be that at no point during the agreement-making process would the provisions of s 111AAA apply. In addition, the content of an agreement made under these provisions would not be constrained by the 'allowable' matters concept applying to federal awards made under Part VI of the *WR Act*.[121]

Importantly, the *WR Act* provides that, subject to certain exceptions, a certified agreement will prevail over 'terms and conditions of employment' in state laws, awards or state employment agreements, to the extent of any inconsistency.[122] In this context, 'state law' is defined in terms which exclude, inter alia, occupational health and safety and workers' compensation.[123] However, omitted from the list of exclusions are a number of the key statutory entitlements applying to state-appointed police officers, such as annual leave, long service leave and superannuation. And so, again, what this means is that many aspects of police employment which would normally remain under the exclusive control of the state governments might become the subject of negotiation between the parties. Furthermore, a federal certified agreement for police would generally prevail not only over an inconsistent state law and state award, but (unlike in the case of a federal award) also over an enterprise agreement which qualifies as a 'state employment agreement'.

118 See generally D C Thomson, 'Employment and the Law in the New South Wales Police Force' (1963) 4 *Sydney Law Review* 404; Lawson Savery and Shane Bushe-Jones, 'The Decline in WA Police Officers' Salaries 1974–1990' (1992) 18 *Australian Bulletin of Labour* 208, 213, 215. Since the late 1980s, the various state police associations have been pursuing strategies seeking nationally consistent 'benchmarks' in their salary claims.

119 See, eg, W J Ford, 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 *Australian Journal of Labour Law* 1, 11–12.

120 It will be argued below that it would not be appropriate to allow state police officers access to the 'protected action' provisions in pt VIB, div 8 of the Act.

121 Section 170LI(1).

122 Section 170LZ(1).

123 Section 170LZ(2). That provision also allows for exclusions prescribed by the regulations.

The impression which emerges from the discussion thus far seems to be that, so far as the objective of achieving federal industrial regulation for state police officers is concerned, members of the state police forces could have much to gain from the introduction of a contract. Indeed, if nothing else, the mere fact that police officers from various state jurisdictions could, for the first time in the history of police labour relations in Australia, enter the federal system and potentially gain national coverage of some of their basic terms and conditions would be of enormous symbolic significance.[124] However, before leaving this topic, it is also necessary to consider to what extent the provisions noted above might be considered constitutionally invalid as infringing upon a state's capacity to function as a government.[125]

In *Re AEU*,[126] a majority of the High Court made it clear that there was no basis for holding that the AIRC was precluded on constitutional grounds from exercising at least some of its powers in relation to the making of awards for state police officers.[127] In reaching this conclusion, the Court drew no distinction between state police officers and other state public servants. The only public sector officials which the majority members of the Court were prepared to exclude altogether from the operation of the federal constitutional power were those engaged 'at the higher levels of government', and it was clear that police officers did not fall into this category.[128]

The Court's conclusions in *Re AEU* were of key significance, since prior to that decision there had been some doubt as to whether police officers could be involved in an industrial dispute. It is important to note, however, that the only issue actually before the Court in *Re AEU* was whether the eligibility rules of the Australian Federal Police Association could be extended so as to apply to members of the state and territory police forces.[129] What impact the implied limitation might have on the power of the AIRC to make an award prescribing particular terms and conditions for police officers was a question which the Court was not required to consider. The majority of the Court only held that an award which prescribed minimum wages for state police officers would not infringe the implied limitation.[130] It was also emphasised, in relation to state public servants generally, that whether a minimum wages and conditions award is beyond constitutional competence would turn on matters of fact, including the character and responsibilities of the employees in question.[131] On the basis of these conclusions, therefore, it might be thought that there are many types of

124 The idea that state and territory police might one day operate in the federal system seems to have been a key long-term goal: see, eg, K D Marshall, 'Survival within the Arbitration System' (Paper presented at the Police Industrial Relations Seminar, Airlie Police College, Melbourne, 9 December 1982) 109–10.

125 See *Re AEU* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Victoria v Commonwealth* (1996) 187 CLR 416, 498 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

126 (1995) 184 CLR 188.

127 Ibid 241 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

128 Ibid 233.

129 An issue initially raised in *Re AFPA [No 2]* (1993) 51 IR 122.

130 *Re AEU* (1995) 184 CLR 188, 241.

131 Ibid 230.

employment matters which, if they were to be included in a federal award or certified agreement for state police officers, might offend the implied limitation.

Tending against such a view, however, is the decision of the Full Federal Court in *Konrad*.[132] In that case, the State of Victoria argued that the operation of the termination provisions of the former *Industrial Relations Act 1988* (Cth) ('*IR Act*') were invalid to the extent that they applied to members of the police force. One of the grounds relied upon by Victoria in making this argument concerned the view, first put forward in *Re AEU*, that:

> The police force is central to the government of the State as such. It is sui generis. Without it … the State would become ungovernable. In that respect, it comprises a class of persons complementary to Ministers and judges upon whom the State depends for its integrity and autonomy. As [was said by Lord Watson in *Coomber v Justices of the County of Berks* (1883) 9 App Cas 61, 74]: '… the administration of justice, the maintenance of order and the repression of crime are among the primary and inalienable functions of a constitutional Government.'[133]

A further argument put to the Court was that to go so far as to require a state to reinstate a police officer under s 170EE of the Act would be so destructive of the authority of those who command a disciplined force, and of the good order and morale of the force, that it would amount to an undue interference with the state's capacity to function.[134]

The Court, however, went on to dismiss this argument, although Finkelstein J did accept that the power to order reinstatement would have such an effect.[135] It was held, firstly, that the termination provisions at issue had nothing to do with the specific exclusions that had been singled out by the High Court in *Re AEU*.[136] Beyond this, however, it was also emphasised that, coupled with the fact that the federal powers themselves were governed by several qualifications, there were already provisions under the *Police Regulation Act 1958* (Vic) placing restrictions on the dismissal of members of the police force. These restrictions were, to some extent, analogous to those under the federal law.[137] It followed, therefore, that the federal termination provisions could not unduly interfere with the performance by Victoria of its functions as a government.[138]

But if, on the basis of this approach, federal laws restricting the dismissal of state police officers (other than on redundancy grounds) would not constitute an

[132] (1999) 91 FCR 95 (Ryan, North and Finkelstein JJ).

[133] Submissions of the Respondents, *Konrad v Victoria Police*, No VG 44 of 1998 (11 February 1999) 8–9.

[134] See *Konrad* (1999) 91 FCR 95, 107 (North J), 129–30 (Finkelstein J).

[135] Ibid 130 (Finkelstein J).

[136] Ibid 102 (Ryan J), 104 (North J), 129 (Finkelstein J). In *Re AEU* (1995) 184 CLR 188, 232 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), the High Court had held that it was critical to a state's capacity to function as a government 'to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss … from its employment on redundancy grounds.'

[137] *Konrad* (1999) 91 FCR 95, 129 (Finkelstein J, North J concurring).

[138] This was held to be so even in the case of a probationary constable, who could be terminated summarily: ibid 129–30 (Finkelstein J).

impairment for a state in the sense meant by the majority in *Re AEU*, it seems difficult to see how many other basic employment rights could be seen as doing so, if police officers are already able to claim such rights under state laws. If this view is correct, then it seems reasonable to suppose that — unless there are questions concerning such matters as the numbers and identity of persons to be employed or declared redundant in the police force — the application of the award and agreement-making provisions of the *WR Act* to state police officers, and in particular the prescription by federal awards or agreements of minimum working conditions, would generally not infringe the implied limitation.[139]

It would be inappropriate, however, to allow state police officers access to the 'protected action' provisions in Division 8 of Part VIB of the *WR Act*. This is distinguishable from affording them access to many other protective employment conditions, such as remedies for unfair dismissal. Access to the 'protected action' provisions would carry with it the real possibility of undermining the authority of those who command the police force. Assuming that this argument provides a viable basis for the operation of the implied limitation, it seems that, so far as police officers' general law enforcement functions are concerned, at least, the protected action provisions could not validly apply. There may, therefore, need to be specific measures introduced into the *WR Act* to accommodate state police officers in respect of these arrangements.

2 *Termination of Employment*

In recent years, police officers' uncertain employment status made it possible to question whether members of the state and territory police forces were 'employees' for the purposes of the termination provisions in Division 3 of Part VIA of the *IR Act* and the equivalent provisions of the *WR Act*.[140] It is clear that, together with the general state unfair dismissal laws,[141] access to these provisions, although subject to a number of statutory constraints, could offer considerable advantages for many state-appointed police officers. This is so for three main reasons.

The first relates to the fact that, while state police officers will at times have access to certain other appeal rights in respect of an adverse dismissal action taken against them,[142] generally the only avenue of redress for them to challenge the *merits* of any such action is provided by their particular police disciplinary

[139] A situation, however, where a federal industrial instrument might be viewed as infringing the implied limitation would arise where it placed restrictions upon senior members' 'command powers', particularly a Commissioner's powers relating to the control and superintendence of the police force.

[140] See *Cook* (1996) 66 IR 361; *Ferguson* (1997) 72 IR 145; *Ward v Commissioner of Police* (1998) 151 ALR 604; *Konrad v Victoria Police* (1998) 152 ALR 132; *Orchard v Victoria Police* (1998) 79 IR 476, 478 (Marshall J); *Konrad* (1999) 91 FCR 95; *Ward* (1999) 165 ALR 57; *Pooley v Commissioner of Police of Northern Territory* (Unreported, Australian Industrial Relations Commission, Hoffman C, 5 October 1999).

[141] I shall not discuss the various state unfair dismissal laws here, though it should be borne in mind that in some state jurisdictions, members of the police force do have access, in varying degrees, to those laws.

[142] In particular, state police officers will, in many cases, have access to a statutory form of judicial review in respect of disciplinary (and other) decisions taken against them, including dismissal.

code.[143] Although the codes provide a right of appeal to a member of the police force who has been dismissed for committing an offence against the discipline of the police force, it is clear that an appeal will not necessarily lie against all types of dismissals or in all situations. Thus, termination of a probationary constable's appointment, for example, may be appealed against on its merits if it relates to an issue of misconduct as defined by the code, but not if it is done on administrative grounds, such as for incapacity.[144]

The second point is that, although an appeal on the merits will lie where a police officer is dismissed under the disciplinary code, in some cases the result of such an appeal is merely a recommendation to the Commissioner; the decision whether to actually rescind the dismissal remains with the Commissioner.[145] It is also important to note that, unlike in unfair dismissal proceedings, the central issue on appeal will not relate to the overall 'fairness' of the decision to dismiss. Rather, the key issues to be determined by the review tribunal will relate to the correctness of the finding of guilt and the appropriateness of the penalty.[146]

The third point is that a substantial line of authority suggests that neither the disciplinary code, nor the police Acts or regulations as a whole, can be seen as curbing the Crown's common law power to dismiss at will.[147] Where this special power exists and is exercised, there will be no right of appeal for police officers against such an action on its merits, nor any other entitlement, although the decision to dismiss would, it seems, have to be exercised by the Governor-in-Council.[148]

The question as to whether state police officers can access the federal termination laws has now been resolved, in part, by the decision of the Federal Court in *Konrad*.[149] In that case Finkelstein J, with whom North and Ryan JJ concurred, held that as one of the stated objects of Division 3 of Part VIA of the former *IR Act* was to give effect to the International Labour Organisation's *Convention Concerning Termination of Employment at the Initiative of the Employer*,[150] and as there was nothing in the Act to suggest that the term 'employee' as used in Division 3 was to be given a meaning that was inconsistent with the scope of the *Convention*, the Division should not be construed more narrowly than the *Convention*.[151] It followed that, having regard to such factors, as the language

143 *NSW Act* pt 9, divs 1, 2; *NT Act* pts V and VI; *Qld Act* pt IX; *Tas Act* s 31, pt IVB; *Vic Act* pt V; *WA Act* s 23, pt IIA.

144 *Kerr v Commissioner of Police* [1977] 2 NSWLR 721, 728 (Moffitt P); McCarry, *Aspects of Public Sector Employment Law*, above n 101, 147.

145 *Qld Act* s 9.5. Similar provisions existed for some time in Victoria prior to the introduction of a new Police Appeals Board by the Bracks Labor government in 1999.

146 McCarry, *Aspects of Public Sector Employment Law*, above n 101, 126.

147 *Ryder v Foley* (1906) 4 CLR 422; *Fletcher v Nott* (1938) 60 CLR 55; *Kaye v A-G (Tas)* (1956) 94 CLR 193; *Reedman v Hoare* (1959) 102 CLR 177. Again though, police officers may nevertheless be entitled to certain public law remedies which could prevent dismissal in some circumstances, as in *O'Rourke v Miller* [1984] VR 277.

148 *Commissioner of Police v Gordon* [1981] 1 NSWLR 675, 680–1 (Moffitt P), referring to *Fletcher v Nott* (1938) 60 CLR 55.

149 (1999) 91 FCR 95.

150 Opened for signature 22 June 1985, 1412 UNTS 159 (entered into force 23 November 1985) ('the *Convention*').

151 Ibid 126–7 (Finkelstein J).

and the preparatory work of the *Convention*, the word 'employee' as used in Division 3 was not confined to its common law meaning, but included all public sector workers, including police constables, within its scope.[152]

The decision of the Full Federal Court in *Konrad* is of key significance, since it seems clear that, in a general sense, the 'unlawful' termination provisions in Subdivision C of Division 3 of the *WR Act* still rely on the *Convention*.[153] Thus, section 170CD(2) of the *WR Act* provides that the expressions in subdivision C (and in subdivisions D and E) are to be given the same meaning as in the *Convention*. As far as the 'unfair' termination provisions in Subdivision B are concerned, however, it is clear that those provisions apply only to certain categories of employees in the strict sense. The most general of these categories, as set out in s 170CB(1), is a 'federal award employee who was employed by a constitutional corporation'. It is clear, however, that even if members of the state police forces were employees at common law, they would not come within this category. On the other hand, it is significant to note that also listed in s 170CB(1) are 'Territory employees'. This means that if police officers were to become employees at common law, members of the Northern Territory police force, at least, could bring claims under Subdivision B as well as Subdivision C.[154]

Before leaving this topic, there is one final matter that must be mentioned. Although the state police Acts provide for an appeal on merits under the disciplinary code, they often contain special or additional removal provisions which do not allow for a review on merits, or which provide for a review only on administrative law grounds.[155] Similarly, and more particularly, under the *Australian Federal Police Act 1979* (Cth), terminations involving a declaration of serious misconduct are not reviewable under the *WR Act*, whereas other terminations are.[156] Accordingly, if state police officers are to have access to the federal termination laws, it may be that the federal Parliament will adopt a similar approach and seek to restrict them from gaining general access to those provisions.

3 *The Police Federation of Australia*

On 26 August 1997, the Australian Federal Police Association ('AFPA') became officially known as the PFA.[157] The reason for the name change was to reflect the fact that, under its new eligibility rules, the AFPA would now be able

152 Ibid 109–20, 126–7 (Finkelstein J).

153 *WR Act* ss 170CB(5)(6), 170CK(1) and 170CA(1)(e).

154 Of course by virtue of s 170CC of the *WR Act*, which authorises the making of regulations to exclude certain kinds of employees, some state police officers could be excluded from the rights contained in both sub-div C and sub-div B, even if otherwise included.

155 See generally M H Codd, *Report on the Suspension and Removal of Police Officers in Western Australia* (2 February 1998) [86]–[102].

156 Part IV, div 6 and s 69B(1)(a). The policy behind these provisions is that, because of the special character of police service and the need to maintain the integrity and reputation of the police force, it would not be appropriate that an outside tribunal should be able to remake the Commissioner's decision to dismiss: Codd, above n 155, [102], referring to the former s 26F provisions.

157 *Re Australian Federal Police Association* (Unreported, Australian Industrial Relations Commission, Williams SDP, 19 August 1997).

to represent police officers throughout the whole of Australia. The Rules of the PFA provide that:

> The [PFA] shall consist of an unlimited number of persons who are:
>
> (i) members, staff members or special members of the Australian Federal Police; or
>
> (ii) persons appointed to any rank, grade, classification or designation of police officer of any Police Force or Service of any State, Territory or Commonwealth Government of Australia …[158]

This expanded coverage for police officers is a result of a 1993 decision of Williams DP approving alterations to the AFPA's eligibility rules.[159] As discussed above, it was in the context of a challenge to that decision that the High Court, in *Re AEU*, confirmed that state-appointed police officers were capable of engaging in an industrial dispute. Following *Re AEU*, however, the decision of Williams DP was the subject of an appeal to a Full Bench of the AIRC, in *Re AFPA*.[160]

The key issue raised before the Full Bench involved the question of whether police officers and police trainees were capable of coming within any of the classes of persons referred to in s 188(1)(b) of the *IR Act*. At the time of the decision (as now) that section relevantly provided that an association capable of applying for registration under the *IR Act* is one in which: (a) 'some or all of the members are employees who are capable of being engaged in an industrial dispute'; and (b) the remaining members, if any, are either officers of the association or 'persons specified in Schedule 3.'[161] In contrast to Williams DP, who had reached the view that police officers, on the basis that they were employees, were capable of falling within the first limb of this provision, the Full Bench held that, given that police officers in Queensland and Western Australia fell within the classes of persons specified in Schedule 3 of the *IR Act*, it was unnecessary to determine that issue.

Two comments may be made here. First, it should be emphasised that in *Re AFPA*, the Full Bench took the view that, in the event that police officers and police trainees were not capable of falling within any of the categories set out in s 188(1)(b), the AFPA's application should have been refused.[162] Although the Full Bench deemed it appropriate to determine this issue, in the circumstances it

158 Police Federation of Australia, *Rules of the Police Federation of Australia*, r 3. The Rules were assented to by the Deputy Industrial Registrar of the AIRC Registry on 31 December 1997.

159 *Re AFPA [No 2]* (1993) 51 IR 122; aff'd *Re AFPA* (1997) 73 IR 155.

160 (1997) 73 IR 155 (Boulton J, Polites SDP, Simmonds C).

161 *IR Act* ss 188(1)(b)(i), 188(1)(b)(ii).

162 *Re AFPA* (1997) 73 IR 155, 156. It seems that the Full Bench proceeded on the assumption that the general requirement that there be at least 'some' members of the AFPA who were employees had already been satisfied. Also, it is of interest to note that although Williams DP appeared to adopt the same approach, on the basis of the earlier views of Moore DP in *Re Independent Teachers Federation* (1989) 30 IR 205, 208–9, he also seemed to entertain the possibility that, even if most police officers were unable to fall within the classes referred to, the reference in the proposed eligibility rule to police officers and police trainees would still be permissible because it would only enable the enrolment of those persons who were employees: *Re AFPA [No 2]* (1993) 51 IR 122, 133, 134 (Williams DP).

found it necessary to do so only in respect of Queensland and Western Australia. In other words, the question of whether members from other jurisdictions might be persons specified in Schedule 3 of the *IR Act*, or whether they could otherwise come within s 188(1)(b) of the *IR Act*, played no part in the reasoning of the Full Bench.

The second point is that while Schedule 3 of the *IR Act* allows a federally registered union to accept as members persons who, although not employees, are eligible for union membership under state industrial legislation, not all state jurisdictions are included in the Schedule.[163] This suggests that police members from those jurisdictions not brought in by Schedule 3 must fall within the first limb of s 188(1)(b). If the vast majority of police officers in these jurisdictions are not employees, however, they could not be considered as coming within this category.

One of the key objects of the PFA is 'to uphold the rights and to foster, protect and improve the rights and interests of members industrially and otherwise'.[164] However, although the PFA may now have the status of a registered organisation of employees under the *WR Act*, it is clear that, as matters stand, its ability to gain access to the scheme under that Act depends upon many of the traditional 'employee' provisions of the *WR Act*. Furthermore, for the reasons given above, it may be that, to the extent that the eligibility rules of the PFA purport to make eligible for membership state police officers not falling within the classes set out in the second limb of s 188(1)(b), those rules are invalid.[165] If this view is correct, then it can certainly be said that, in this context, the introduction of a contract of employment for state police officers would be vital to their industrial interests.

B *Contractual Remedies*

As already noted, police officers will usually be able to rely on public law remedies, particularly where they seek to reverse a dismissal decision on the grounds that the rules of natural justice have not been adhered to. It may be that a move to contractual status will narrow the scope for them to obtain such remedies.[166] Once again though, while this might represent a significant loss to many police officers, the application of some of the major contractual principles to their appointment would mean that they could still have much to gain as employees.

163 The schedule refers only to 'deemed' employees under the New South Wales, Queensland, South Australia and Western Australia Acts.

164 Police Federation of Australia, *Rules of the Police Federation of Australia*, r 4(a).

165 The Rules might also be invalid to the extent that they extend to those state-based police officers who are 'higher level' office-holders in accordance with *Re AEU* (1995) 184 CLR 188.

166 See Graham Smith, *Public Employment Law: The Role of the Contract of Employment in Australia and Britain* (1987) 203; and *Blizzard v O'Sullivan* [1994] 1 Qd R 112, holding that the decision to dismiss an executive police officer employed under contract was not a decision of an administrative character made under an enactment and that judicial review was thus unavailable. On the other hand, it seems that this principle has been applied to police officers even in the absence of a contract: see *Sellars v Woods* (1982) 45 ALR 113.

One area where a contract may be of particular significance is in relation to the employer's implied contractual obligation of 'mutual trust and confidence'.[167] In Britain, employers have been found in breach of this obligation in many different ways.[168] It is submitted that this implied term could have a significant impact in a policing context. It is true, as one British commentator has pointed out, that 'it would be impossible to meet some operational needs if too much attention is paid to the needs and feelings' of police constables, and that there would be important public policy issues to consider in this context.[169] However, there seems to be no reason why (as with a number of other protective employment rights which already apply) the obligation could not apply to many 'non-operational' areas of a police officer's engagement.[170] Not only would application of the term be consistent with police officers' statutory employment rights, it would also be consistent with their current 'good faith' obligations, both towards their employer and the wider community. Indeed, it seems a valid argument that it would tie in with contemporary police employment entitlements, and may even increase the effectiveness of those entitlements, if police officers had the same basic rights as other employees in this context.

Another important area of contractual rights concerns the right to sue for dismissal in breach of contract. A remedy for wrongful dismissal, were it to become available to police officers, would be significant for two main reasons: firstly, because, as noted above, even if police officers were held to be employees, some police would still lie outside the protection of unfair dismissal laws; and secondly, and more specifically, because it may be open to police officers to argue that, since they work in a specialised profession with no alternative avenues in either the private or public sector, and since one's rank in the police force is still governed largely by promotion, the deprivation of these opportunities ought to be the subject of special consideration in any damages claim.

As already noted, however, it is clear from the case law that the rule that police officers may be dismissed at the will of the Crown is well-established in Australia, and indeed in some cases the rule has been expressly preserved by statute.[171] Although it has been argued that, where it has not been so preserved, the rule can be excluded by contract,[172] the alternative view is that it can only be excluded by statute. Further, it has sometimes been suggested that there is no real difference between police and military officers in this context, meaning that the same *additional* public policy justifications apply.[173] What each of these factors suggests, therefore, is that even if police officers were held to be employees, they may still have no right to a claim for wrongful dismissal.

167 See *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; *Malik v Bank of Credit and Commerce International SA* [1998] AC 20.

168 Greg McCarry, 'Industrial Law and Relations: Damages for Breach of the Employer's Implied Duty of Trust and Confidence' (1998) 26 *Australian Business Law Review* 141, 141.

169 Stephen Piper, 'Workers' Rights' (1997) 105(5412) *Police Review* 26, 26.

170 Ibid.

171 See, eg, *Police Regulation Act 1898* (Tas) s 11.

172 Peter Hogg, *Liability of the Crown* (2nd ed, 1989) 175.

173 Chris Arup, 'Security at Law of Public Employment in Australia' (1978) 37 *Australian Journal of Public Administration* 95, 98; Smith, above n 166, 91–3, 196.

In view of these issues, it seems important that if a contract were to be introduced, this should be accompanied by the outright removal of the dismissal at pleasure doctrine. In Australia, the doctrine has been criticised by judges and academic commentators as being entirely at odds with modern employment practices and the cause of blatant injustice.[174] It has been similarly criticised in Britain.[175] The main justification for the rule in a policing context is said to be the maintenance of discipline in the police force. Again though, in an era when most police officers have similar dismissal rights as other employees, including, in some instances, rights to remedies for unfair dismissal, there is no reason why the rule should be maintained. Despite the fact that remedies such as reinstatement will rarely be available in this context, the removal of the dismissal at pleasure rule would at least make it possible for those police officers excluded from unfair dismissal laws to pursue an action for damages.

Another important area of contractual rights for police officers concerns 'the legitimate scope of the constable's employment.'[176] It has been argued in Britain that the obligation of police constables to obey all 'lawful orders', coupled with the absence of a contract, leaves individual constables exposed to the 'virtual absolute discretion' of the chief officer of police.[177] Together with the fact that there is no clear authority as to what is meant by a 'lawful' order in this context, the courts have consistently refused to set precise limits on the scope of the police officer's duties.[178] Thus it is argued that the establishment of an employer-employee relationship would give greater clarity to the scope of a police officer's duties.

More particularly, however, provided that a 'lawful order' is one which is not only not unlawful, but one which must also relate to the common law and statutory duties of constable, it might also provide a framework through which the constable could challenge the legitimacy of orders considered beyond the range of such duties.[179] It is true that the courts would tend to view police officers as constituting a special category for these purposes, because of their extensive statutory and common law obligations.[180] Nonetheless, the British courts have recognised that not *every* activity constables may lawfully perform would necessarily fall within the scope of their duty.[181] It therefore seems reasonable to assume that the existence of a contract would also assist in defining the scope of orders (and discipline) to which the constable may be made subject.

174 Ronald McCallum, 'Industrial Law and Relations' (1987) 15 *Australian Business Law Review* 366, 367.
175 Sandra Fredman and Gillian Morris, 'Civil Servants: A Contract of Employment?' [1988] *Public Law* 58, 69–70.
176 Sandra Fredman and Gillian Morris, *The State as Employer: Labour Law in the Public Services* (1989) 73.
177 Ibid 72–3.
178 See Gillian Morris, 'The Police and Industrial Emergencies' (1980) 9 *Industrial Law Journal* 1.
179 Ibid.
180 Cf *Anderson v Sullivan* (1997) 78 FCR 380.
181 Morris, above n 178, 6.

Finally, it is of course true that if police officers were to become employees, the Crown might then be able to sue for breach of contract. However, as already mentioned, the statutory provisions applying to a police officer's employment already impose wide-ranging obligations upon police officers. Furthermore, not only do these obligations impinge on their activities both inside and outside the workplace, they also tend to prescribe penalties which extend beyond those normally available to the Crown (or Commissioner) at common law. This suggests that, in many contexts, the presence of a contract for police would have little impact. It also seems fair to say that if (instead of relying on statutory remedies) the Crown actually claimed financial compensation for breach of a particular contractual obligation, damages would be rather more difficult to assess.

IV CONCLUSION: REDEFINING POLICE EMPLOYMENT STATUS

It is true, as D C Thomson wrote in 1963, that because of the special characteristics of police work, employment conditions in the police force will always have to be 'rather different from those in other occupations.'[182] Thus, although many police employment conditions now substantially reflect general employment conditions, they are also often subject to special exemptions relating to police operational requirements. There can be no compelling reason, however, why this factor alone should prevent police officers from being employees. Nor can it be said that such a move would be prejudicial to discipline within the police force now that, in a number of key areas, many of the usual protective employment rights are specifically extended to police officers. What it would do, however, is promote symmetry between police officers' current employment entitlements and their position at common law.[183]

There can also be no reason to suppose that the courts themselves, if faced with competing public interest considerations relating to the police, could not find a balance between those interests.[184] This seems to be recognised in the recent reforms to the *Australian Federal Police Act 1979* (Cth), which have drawn only a few direct distinctions between the Commissioner's general 'employment' powers on the one hand, and his or her powers as 'commander' of the police force on the other. It has also been recognised in state legislation including police officers in the same broad category as other Crown employees.[185] To simply assume that police officers are not employees, however, is to risk paying too little attention to the rights of the individual police constable.

The recent Australian decisions on police employment status have prompted some states to introduce further remedial legislation in respect of their police

182 Thomson, above n 118, 415.

183 That police officers ought to be considered employees at common law also finds strong support in Britain: see, eg, Fredman and Morris, *The State as Employer: Labour Law in the Public Services*, above n 176, 73; Lustgarten, above n 53, 31.

184 It also seems fair to assume that, if police officers gained additional rights as a result of being employees, the courts would view any activities associated with their general peacekeeping and law enforcement duties as taking precedence in the case of conflict.

185 Although state employment Acts, where they refer to members of the police force, often also make exceptions for them, this is not always the case.

officers. New South Wales and Western Australia, for example, have followed the lead of other jurisdictions and introduced provisions 'deeming' members of the police force to be employees for the purposes of the occupational health and safety laws in those states.[186] Bearing in mind that voluntary arrangements have also commonly operated in these areas, this suggests that state governments themselves generally support the idea that police officers ought to have the same employment rights as other employees in most situations. It might therefore not be entirely out of step for them to introduce additional deeming provisions for police. Or, indeed, in view of recent reforms to the AFP, it may be open to some state legislatures to adopt a similar model and address the status issue in its entirety.

It could be argued, however, that the state legislatures' reliance on deeming provisions for police officers reveals their tacit acceptance of the current common law position.[187] Furthermore, past experience would suggest that proposals for the introduction of deeming provisions for police have not always been successful, with the parties left to rely on informal arrangements.[188] A further problem is that, even when the possible exclusion of police has been foreseen and countered in express terms, some of the legislative arrangements made have not dispensed with contractual notions. This is likely to give rise to a number of practical problems, particularly in statutes where such expressions as 'course of employment' or 'course of service' are applied.[189]

It has also been suggested that the decision of the Full Federal Court in *Konrad*[190] has laid the groundwork for a broader and more effective definition of the employment relationship. In particular, it has been argued that the decision has shown how a federal government could legislate to give employment rights to all kinds of workers, including certain 'non-employees'.[191] Certainly, insofar as it might allow state police officers to gain access to the federal industrial relations framework, the approach adopted in *Konrad* by the Full Federal Court could eventually be of major importance. The decision will also be significant if it encourages other courts and tribunals to interpret the meaning of the term 'employee' in similar legislation to include police officers. It remains to be seen, however, to what extent *Konrad* will be relied upon in drafting new federal legislation. It also remains to be seen just how far the decision will be applied to police officers in other legal contexts. Given the widespread legislative accep-

186 *Occupational Health and Safety Act 2000* (NSW) s 137; *Occupational Safety and Health Act 1984* (WA) s 3(4) (commencing 3 January 2004).

187 Cf Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (3rd ed, 2000) 203. In Western Australia, for example, legislation has now been introduced which deems police officers to be employees for specified industrial purposes: *Industrial Relations Act 1979* (WA) sch 3; *Industrial Relations Amendment Act 2000* (WA) s 5.

188 A case in point is the Industrial Relations Amendment Bill (No 3) 1992 (WA), which had proposed to introduce provisions which deemed members of the Western Australian police force to be employees for the purposes of the general industrial statute in that State. The Bill was apparently withdrawn in the face of what were considered insurmountable bureaucratic and political obstacles.

189 Richard Clayton and Hugh Tomlinson, *Civil Actions against the Police* (1992) 37–8.

190 (1999) 91 FCR 95.

191 See, eg, Professor Ron McCallum in Stephen Long, 'New Protection for Contractors', *The Australian Financial Review* (Sydney), 6 September 1999, 3.

tance of the employee/non-employee distinction, and given the courts' traditional approach to the interpretation of employment legislation in Australia,[192] much will probably still depend on the particular wording of the provisions in question.

In view of these factors, it is suggested that legislative reform might not be the most practical option, and may only be able to deliver piecemeal reform. Nor, however, should reliance be placed merely on informal arrangements. The presence of such arrangements has undoubtedly been of great benefit to many police officers over the years. Nonetheless, as has been argued in other contexts, these arrangements place a good deal of faith in the Crown acting as a 'model employer'.

We shall have to wait for another major decision to reconsider the rule that police constables are not employees. The response of the High Court in its 1952 decision in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*[193] was arguably understandable, considering the context in which that case was decided. But whatever justification the rule might have had then, it is certainly no longer justifiable. Given the universal discontent with the *Perpetual Trustee* doctrine, and given the practical difficulties and inequities arising from that doctrine — even in modern times — the High Court should re-examine *Perpetual Trustee* and hold that police officers are both office-holders and employees.

[192] Creighton and Stewart, above n 187, 202–3. These authors refer to the decision in *Konrad* as a 'rare exception'.

[193] (1952) 85 CLR 237.