

CITATION: *Bahnert v Commissioner of Police & Anor* [2024] NTSCFC 2

PARTIES: BAHNERT, Geoffrey Robert

v

COMMISSIONER OF POLICE

and

INABILITY APPEAL BOARD

TITLE OF COURT: FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: ON REFERENCE from the Supreme Court exercising Territory jurisdiction

FILE NO: 2022-02413-SC

DELIVERED: 27 September 2024

HEARING DATE: 29 September 2023

JUDGMENT OF: Grant CJ, Kelly and Barr JJ

CATCHWORDS:

EMPLOYMENT AND INDUSTRIAL LAW – Public-sector – Police

Referral of questions of law to the Full Court – Whether Commissioner of Police may exercise power under s 87(a) and s 89(d) of *Police Administration Act 1978* (NT) to retire member from Police Force where member unable to perform duties because of medical incapacity – Whether exercise of power under s 87 and s 89 conditioned by obligation to consider financial consequences for the member and/or taking steps to facilitate member returning to duties – Whether “duties the member was employed to perform” in s 87(a) refers to all duties of a police officer.

Police Administration Act 1978 (NT), ss 87, 88, 89, 90, 91, 94

Alcan (NT) Alumina v Commissioner of Territory Revenue (2009) 239 CLR 27, *Anthony Hordern and Sons v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, *Commissioner of Police v Farquhar* [2010] NTSC 61, *Enever v The King* (1905) 3 CLR 969, *Gibson v Ellis* (1992) 59 SASR 420, *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, *New South Wales v Tyszyk* [2008] NSWCA 107, *R v Bates; Ex parte O'Brien* (1997) 140 FLR 128, *R v Fazio* (1997) 69 SASR 54, *R v Rolfe (No 5)* [2021] NTSCFC 6, *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, considered.

REPRESENTATION:

Counsel:

Plaintiff:	C Jacobi KC with L Officer
First Defendant:	M Chalmers SC with T Moses
Second Defendant:	Submitting appearance

Solicitors:

Plaintiff:	Tindall Gask Bentley
First Defendant:	Hutton McCarthy
Second Defendant:	Submitting appearance

Judgment category classification: B

Number of pages: 39

IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bahnert v Commissioner of Police & Anor [2024] NTSCFC 2
No. 2022-02413-SC

BETWEEN:

GEOFFREY ROBERT BAHNERT
Plaintiff

AND:

COMMISSIONER OF POLICE
First Defendant

AND:

INABILITY APPEAL BOARD
Second Defendant

CORAM: GRANT CJ, KELLY and BARR JJ

REASONS FOR JUDGMENT
(Delivered 27 September 2024)

THE COURT:

- [1] The Plaintiff is a former member of the Northern Territory Police Force. He has filed an Originating Motion in the Supreme Court seeking an order quashing a decision made by the Inability Appeal Board on 25 July 2022 disallowing an appeal from a finding that he was not fit to discharge, suited to perform or capable of efficiently performing the duties of a police officer; and a decision subsequently made by the Commissioner of Police on

11 August 2022 retiring the Plaintiff from the Northern Territory Police Force. The Originating Motion also seeks a declaration that those two decisions, and two precursor decisions, were beyond the powers conferred by ss 87 and 89 of the *Police Administration Act 1978* (NT) (“the PAA”).

Referral to the Full Court

[2] The trial judge in this matter has referred the following questions of law to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT).

1. Where the Commissioner of Police (“the Commissioner”), or a prescribed member has formed, or could reasonably form, the opinion that a member is “unable to efficiently or satisfactorily perform the member’s duties” because of a physical or mental condition (“medical incapacity”) within the meaning of s 91 of the PAA, may the Commissioner exercise the power under s 87(a) and s 89(d) of the PAA by reason of that medical incapacity to “advise the member in writing that the Commissioner intends to retire the member from the Police Force”?
2. If the answer to question 1 is “yes”, is the exercise of the power by the Commissioner to take action under s 87 and later s 89 conditioned by an obligation to consider the financial consequences for the member described in s 91(5) and/or the taking of “steps” to facilitate the member returning to duties in s 91(6) of the PAA?
3. If the answer to question 1 is “yes”, in forming an “opinion” for the purposes of s 87(a) and s 89 on the basis of a “physical or mental condition”, does the expression in s 87(a) the “duties the member was employed to perform” refer to all duties of a police officer that a member might be directed to perform?

Agreed facts

[3] The following facts have been agreed between the parties for the purpose of this referral.

- (a) The Plaintiff became a member of the Northern Territory Police Force (“NTPF”) in 1988 and, as at 11 August 2022, he held the rank of Senior Sergeant.
- (b) With effect from 12 August 2022, the Plaintiff was retired under s 89(d) of the PAA by the Commissioner.
- (c) The Plaintiff was exposed to a number of traumas both prior to and during his time working as a member of the NTPF. Many of the traumas were work-related, and others were not.
- (d) During his period of continuous employment, the Plaintiff was absent from duty for the following significant periods due to his mental health: in 2005 for approximately nine months; in 2008 and 2009 for approximately 14 months; between October 2010 and April 2011; and from early 2016 to June 2017. There was a brief attempted return to work in June 2017, following which the Plaintiff was absent through to his retirement date on 11 August 2022.
- (e) On 5 September 2017, the Plaintiff made a claim for workers compensation under the *Return to Work Act 1986* (NT) on the basis of a “mental condition”, being a chronic post-traumatic stress disorder. That claim was accepted. He was then certified to be unfit for duties.
- (f) The Plaintiff’s General Practitioner certified the Plaintiff as fit for non-operational duties with restricted hours as at 17 August 2020, and fit to resume non-operational duties on a full-time basis as at 7 December

2020. The medical opinions underpinning the certification were disputed by the Commissioner.

Process under Part V and VI of the PAA

- (g) On 22 July 2019, a prescribed member formed the opinion that the Plaintiff “was unable to efficiently or satisfactorily perform the member’s duties because of a mental condition” within the meaning of s 91(2) of the PAA. Principally, this opinion was based on a report dated 1 July 2019 by Dr Little, a consultant psychiatrist.
- (h) The prescribed member gave a direction to the Plaintiff pursuant to s 91(2) of the PAA to submit to an examination by a health practitioner.¹
- (i) An examination of the Plaintiff was then conducted on 13 August 2019 with consultant psychiatrist, Dr Hundertmark. Dr Hundertmark provided a report to the Commissioner of 22 August 2019. Dr Little provided a responding report of 16 September 2019 to Dr Hundertmark’s report. Dr Hundertmark provided a further report of 9 October 2019 in reply.
- (j) On 31 December 2019, the prescribed member reported to the Commissioner, who formed the opinion on the basis of those reports and the other information available to him that the Plaintiff was not “totally and permanently incapacitated”, but assessed the member to be

¹ A copy of the s 91(2) Notice is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

“unable to perform (his) duties efficiently or satisfactorily because of a physical or psychological condition”.

- (k) Further, the Commissioner having formed the opinion that the member was “not fit to discharge, suited to perform or capable of efficiently performing, the duties the member is employed to perform” in purported exercise of the power in s 87 of the PAA so advised the member by written Notice (“the s 87 Notice”) (“the First Decision”) and invited his response.²
- (l) On 10 January and 16 January 2020, the Plaintiff’s legal representatives wrote responding to the s 87 Notice.
- (m) On 20 January 2020, a memorandum was provided to the Acting Commissioner of Police, Michael White, informing him of the Plaintiff’s explanation, and that, if he was not satisfied with the Plaintiff’s explanation, he should arrange for a review to be carried out to determine whether his opinion formed under s 87 of the PAA was well founded. Annexed to this Notice of Case Stated and marked “C” is that memorandum.³
- (n) On 23 January 2020, Acting Commissioner White wrote to the Plaintiff and advised that he was not satisfied with the explanation provided by the Plaintiff and, in accordance with s 87 of the PAA, arranged for a

2 A copy of the memorandum is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

3 A copy of the s 87 Notice is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

review to be undertaken pursuant to s 88(1) of the PAA by Assistant Commissioner Anticich to determine whether his opinion was well founded.⁴

- (o) On 20 February 2020, Assistant Commissioner Anticich advised the Plaintiff that he had completed his review and concluded that the opinion of the Commissioner, that the Plaintiff is not fit to discharge, suited to perform or capable of efficiently performing the duties he is employed to perform, was well founded.⁵
- (p) On 1 May 2020, the Commissioner gave notice that he intended to retire the Plaintiff from the NTPF, pursuant to s 89(d) of the PAA (“the s 89 Notice”) (“the Second Decision”).⁶

The appeal to the Inability Appeal Board

- (q) On 15 May 2020, the Plaintiff appealed the Second Decision to the Inability Appeal Board (“the Board”).
- (r) Additional evidence in the form of further medical reports, documents and oral testimony was received by the Board on the hearing of the Appeal, which proceeded as a hearing *de novo*. Conflicting views are expressed in the expert evidence as to whether the Plaintiff is capable

⁴ A copy of that letter is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

⁵ A copy of that letter is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

⁶ A copy of the s 89 Notice is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

of performing duties of a Police officer, whether wholly or partly in the sense of performing restricted or non-operational duties.

- (s) On 25 July 2022, the Board disallowed the appeal of the Plaintiff pursuant to s 94(6) of the PAA and (*inter alia*) found that the Plaintiff was not fit to discharge, suited to perform or capable of efficiently performing the duties that he was employed to perform (“the Third Decision”).⁷
- (t) On 11 August 2022, the Commissioner retired the Plaintiff from the NTPF with effect on 12 August 2022, in the purported exercise of the power in s 89(d) of the PAA (“the Fourth Decision”).
- (u) On 25 September 2022, the Plaintiff commenced judicial review proceedings by Originating Motion in the Northern Territory Supreme Court seeking relief, including declarations, from the First, Second, Third and Fourth Decision.

The operation of the statutory scheme

- [4] Sections 87, 89 and 91 of the PAA, which are the primary focus of this reference, all fall within Part V of the PAA, which is titled “Inability of member to discharge duties”.
- [5] Section 87 of the PAA relevantly provides that where the Commissioner is of the opinion that a member “is not fit to discharge, suited to perform or

⁷ A copy of the reasons of the Board is annexed to the Notice of Case Stated and the parties agreed that any statement of fact contained in that document is included in the Case Stated.

capable of efficiently performing, the duties the member is employed to perform”, the Commissioner shall advise the member in writing of that opinion and the grounds on which it is formed, and invite the member to indicate in writing whether he or she agrees with the opinion or to explain in writing any matter referred to in the notice.

[6] Section 88 of the PAA provides that if the Commissioner is not satisfied with the member’s explanation (or if none is provided), the Commissioner shall arrange for a review to be carried out by one or more members to determine whether the opinion is well founded. The reviewing member(s) are required to advise the Commissioner and the subject member in writing of their findings as a result of the review. In the course of that review process, the reviewing member(s) may direct the subject member to submit to examination by one or more health practitioners if that is relevant to the review. Where a direction in those terms is given, the subject member may also be examined by a health practitioner of his or her own choice and submit the report of that examination to the reviewing member(s). If the subject member refuses to comply with a direction to submit to medical examination, the reviewing member(s) shall notify the Commissioner of the refusal, and the Commissioner shall take such action under the PAA (other than dismissal) as the Commissioner thinks fit.

[7] Section 89 of the PAA provides that if the member has initially agreed with the Commissioner’s opinion, or if following the review process the Commissioner remains of the same opinion on the same grounds, or on

different grounds revealed by the review, the Commissioner may take either “no action” or a number of specified actions. Those specified actions include directing the member to take leave; standing the member down on full salary on compassionate grounds for a period not exceeding three months; transferring the member to other duties, including duties of a lower rank and salary; or advising the member in writing that the Commissioner intends to retire the member from the Police Force.

- [8] Section 90 of the PAA relevantly provides that at any time after a notice has been served under s 87, the Commissioner may, pending the completion of the process including any appeal, stand the member down for a period not exceeding three months, including extending the period for successive three-month terms; direct the member to take leave; or transfer the member to other duties, including duties of a lower rank and salary. The Commissioner is expressly empowered to take any one or more of those actions, to have effect either concurrently or sequentially.
- [9] Although it would appear from those provisions that a member’s fitness and capability to perform duties may involve a consideration of medical issues, s 91 of the PAA deals specifically with what its title describes as “Medical incapacity”. Subsection 91(1) provides that a member “shall be taken to be totally and permanently incapacitated ... if, because of a physical or mental condition, it is unlikely that the member will ever be able to work in any employment or hold any office for which the member is reasonably qualified

by education, training or experience or could become reasonably qualified after retraining”.

[10] Section 91 the PAA goes on to provide that where the Commissioner or a “prescribed member”⁸ is of the opinion that a member “is unable to efficiently or satisfactorily perform the member’s duties because of a physical or mental condition”, the Commissioner or prescribed member may direct the member to submit to an examination by one or more health practitioners. As in s 88 of the PAA, where a direction in those terms is given, the member may also be examined by a health practitioner of his or her own choice and submit the report of that examination to the Commissioner or prescribed member. After considering the results of those examinations, and all other relevant information available to the Commissioner or prescribed member, the Commissioner may determine whether the member is “totally and permanently incapacitated”. Where the process has been undertaken by a prescribed member, that prescribed member is required to report the findings of the examinations to the Commissioner for the purpose of allowing the Commissioner to make a determination.

[11] Section 91(5) of the PAA goes on to provide that where the Commissioner determines “that a member is totally and permanently incapacitated, the Commissioner may, after considering the provisions of any superannuation

8 Section 4(1) of the PAA defines "prescribed member" to be a member holding the "prescribed rank". Regulation 18 of the *Police Administration Regulations 1994* (NT) provides that for Part V of the PAA, the prescribed ranks are Assistant Commissioner and Deputy Commissioner.

legislation applying to the member, retire the member from the Police Force on the grounds of invalidity or take such action under [Part V] as the Commissioner thinks appropriate”. Section 91(6) of the PAA provides that where the Commissioner does not determine that the member is totally and permanently incapacitated, but assesses the member to be unable to perform “the member’s duties efficiently or satisfactorily because of a physical or mental condition”, the Commissioner “shall take whatever steps he considers reasonable and practicable to facilitate the member resuming those duties or take such other action under [Part V] as the Commissioner thinks appropriate”.

- [12] Part VI of the PAA confers and governs rights of appeal, including inability and disciplinary appeals. Section 94 of the PAA relevantly provides that a member aggrieved by a direction, action or intention under s 89 by or of the Commissioner, including a decision or opinion as a result of which such an action was taken, direction given or intention made, may appeal to an Inability Appeal Board against the direction, action or intention. In determining that appeal, the Inability Appeal Board may disallow the appeal or allow the appeal in whole or part and direct the Commissioner to take such action under s 89 of the PAA as the Appeal Board considers necessary.

Exercise of powers in case of “medical incapacity”

- [13] Against that factual and statutory background, the first question of law referred is whether, in circumstances where the Commissioner or a prescribed member has formed, or could reasonably form, the opinion that a

member is “unable to efficiently or satisfactorily perform the members duties because of a physical or mental condition” within the meaning of s 91(2) of the PAA, the Commissioner may initiate an enquiry into fitness, suitability and capability under s 87(a) of the PAA, and subsequently retire the member under s 89(d) of the PAA on the basis of that medical incapacity.

[14] The Plaintiff contends that question should be answered in the negative. In making that contention, the Plaintiff seeks to characterise the process which occurred (as set out in the agreed facts) as follows:

The process which led to the Plaintiff’s retirement on the basis of his medical incapacity was pursued initially under s 91 of the PAA, but abandoned when the pre-conditions in s 91(5) to the exercise of the power to retire on the grounds of invalidity were not met.⁹

[15] That is not a complete or accurate characterisation of what occurred.

Rather, when the Commissioner determined that the Plaintiff was not totally and permanently incapacitated, and that the procedure under s 91(5) was accordingly not available, he proceeded in accordance with s 91(6) as the appropriate course to follow.

[16] Having assessed that the Plaintiff was unable to perform his duties efficiently or satisfactorily because of a physical or mental condition, the Commissioner was empowered under s 91(6) to “take such other action under [Part V] as the Commissioner thinks appropriate”. As already described, Part V of the PAA consists only of ss 87 to 91 inclusive. The

⁹ Plaintiff’s Written Submissions, 25 August 2023, par [1].

giving of notice under s 87, as the Commissioner did in this case, was on the basis that it was “other action” under Part V within the meaning of s 91(6) of the PAA. That the Commissioner was following that course is apparent from the fact that the notice of inability to discharge duties dated 31 December 2019:

- (a) made reference to the fact that the Plaintiff had been examined by Dr Hundertmark pursuant to s 91(2) of the PAA, and Dr Hundertmark’s opinion that the Plaintiff was able to return to restricted duties which did not involve “frontline activities”;
- (b) recorded the opinion of the Plaintiff’s treating psychiatrist that the repeated deteriorations in the Plaintiff’s mental health had been most often precipitated by “events surrounding various NT police matters”, and that placing the Plaintiff in a “non-operational position” would not alleviate that risk;
- (c) recorded Dr Hundertmark’s opinion in response that the Plaintiff was fit for a return to duties in the police force, but not frontline duties where he would have to have contact with the general public or undertake direct policing duties in the community;
- (d) recorded the requirement in s 91(4) of the PAA to consider the results of those examinations and all other relevant information in order to determine whether the Plaintiff was totally and permanently incapacitated;

- (e) recorded that having considered the medical reports, the Commissioner had determined that the Plaintiff was not totally and permanently incapacitated, and assessed further pursuant to s 91(6) of the PAA that the Plaintiff was unable to perform his duties efficiently or satisfactorily because of a physical or psychological condition; and
- (f) expressed the opinion pursuant to s 87 of the PAA, formed on the basis of those reports, that the Plaintiff was not fit to discharge, suited to perform or capable of efficiently discharging the duties he was employed to perform.

[17] The question whether the Commissioner was precluded from initiating an enquiry under s 87(a) of the PAA, and subsequently retiring the member under s 89(d) of the PAA, is one of statutory construction. In *Alcan (NT) Alumina v Commissioner of Territory Revenue*, the plurality stated:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text that legislation is the surest guide to legislative intention.¹⁰

[18] The text of Part V of the PAA provides expressly that, in an enquiry into medical incapacity under s 91, if the Commissioner does not find that the member is totally and permanently incapacitated but assesses the member to be unable to perform the member's duties efficiently or satisfactorily because of a physical or mental condition, the Commissioner may “take such

10 *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

other action under this Part as the Commissioner thinks appropriate”. On a plain reading of the provision, one of the options authorised by the text of s 91(6) is to exercise the power under s 87(a) of the PAA by reason of that medical inability to advise the member in writing of that opinion and to invite a response. If it is accepted that course was permissible and valid under the legislative scheme, a plain and natural reading of the provisions would then support the construction that retirement under s 89(d) of the PAA was also available, subject to the satisfaction of the statutory preconditions.

[19] The construction which the Plaintiff urges relies in the main upon the assertion that the powers in ss 87 to 89 of the PAA do not apply to medical incapacity. That assertion is inconsistent on its face with the statutory direction in s 91(6), after the Commissioner has formed a view that the member in question has an inability referable to a physical or mental condition, to “other action” under Part V. In context, the reference to “other action” would plainly seem to be a reference to action under ss 87 to 89. The Plaintiff’s assertion is also inconsistent with the express contemplation of examination by a health practitioner in s 88 of the PAA, and the requirement on the part of the reviewing member(s) to take any report of such an examination into account in reaching the findings concerning the grounds under s 87 of the PAA.

[20] The Plaintiff seeks to address those textual considerations with the contention that the word “action” which appears in ss 91(5) and 91(6) has a

particular meaning in Part V of the Act which does not extend to an administrative step such as the issue of a notice under s 87 or the provision of advice of an intention to retire under s 89(d). The Plaintiff's contention is that the word "action" in ss 91(5) and 91(6) must be taken to mean either "no action" or the actions in ss 89(a), (b) and (c) only; and that it cannot be taken to refer back to s 87 so as to authorise the issue of a fresh notice under that section. This is said to be because the conception and meaning of "action" under the PAA is the ultimate exercise of compulsory power by the Commissioner on the terms and conditions of employment of a member.

[21] The Plaintiff relies in this respect on s 94 of the PAA, which confers rights of appeal against particular types of "action" by the Commissioner or a member or prescribed member. Section 94 relevantly provides:

Inability or disciplinary appeals

- (1) A member aggrieved by:
 - (a) the action of the Commissioner under section 78; or
 - (b) the action under section 84E(3) by a member; or
 - (c) the action under section 81(2)(d) or 84D by the Commissioner or a prescribed member; or
 - (ca) a direction of the Commissioner under section 84G that the member not be paid salary during the period of the member's suspension under section 76A or 80; or
 - (d) a direction, action or intention under section 89 by or of the Commissioner; or
 - (e) a decision or opinion as a result of which such an action was taken, direction given or intention made,may, within 14 days after being notified of the action, direction or intention (or, in a case referred to in paragraph (b), within 14 days after being notified of the action taken as a result of a review under section 84E(3)), and in the prescribed manner and form:

- (f) in the case of an action referred to in paragraph (a), (b), (c) or a decision or opinion relating to such action – appeal to a Disciplinary Appeal Board against the action; or
- (fa) in the case of a direction referred to in paragraph (ca) – appeal to a Disciplinary Appeal Board against the direction; or
- (g) in the case of a direction, action or intention referred to in paragraph (d) or a decision or opinion relating to such direction, action or intention – appeal to an Inability Appeal Board against direction, action or intention.

[22] The Plaintiff says that the distinction drawn between “direction”, “action”, “intention”, “decision” and “opinion” in this provision evinces an intention on the part of the legislature that the term “action” has a specific and restricted meaning, not only in Part VI but also in the other parts of the PAA. That construction is said to receive support from the fact that the paragraph of s 94 which specifically confers the right of appeal in relation to s 89 does so by the formulation “direction, action or intention”, which reflects that s 89(a) is concerned with a “direction” to take leave and s 89(d) is concerned with an “intention” to retire, while the other two paragraphs within that section contemplate “action” in the form of standing down and transfer.

[23] The assumption that words are used consistently in a piece of legislation is readily rebuttable in circumstances where the terms of the statute suggest that the one word (and its grammatical parts) may have a different operation in different parts of the statute. That is particularly so where the assumption is applied to compel something other than the ordinary meaning of a word to be placed upon it. There will be cases in which it is apparent from the

different contexts in which a word appears that it will have different meanings. In this case, there is good reason for concluding that the phrase “such other action under this Part” appearing in s 91(6) of the PAA is not confined by the distinctions drawn in s 94.

- [24] *First*, s 94(6) clearly uses the term “such action” to refer to any of the processes which might be adopted by the Commissioner under s 89, including retirement. The better view is that the formulations “direction, action or intention” and “decision or opinion” are used in those provisions conferring rights of appeal in order to obviate arid definitional arguments concerning amenability to appeal, rather than to limit the meaning of the term “action” appearing elsewhere in the legislation for different purposes.
- [25] *Secondly*, it is artificial to seek to draw distinctions between an intention to retire a member under s 89(d) of the PAA on the one hand, and the exercise of a compulsory power under a member’s terms of employment on the other hand, and thereby to characterise retirement as something other than “action” under Part V. It is apparent from the definition of “retire” in s 4 of the PAA that it constitutes a termination of the employment of a member under the terms of the statute otherwise than by dismissal. That can be nothing other than the exercise of a compulsory power under the statutory conditions of a member’s employment. The formation of an opinion and the issue of notice under s 87 of the PAA is simply a precursor to the exercise of that power.

[26] *Thirdly*, the term “action” is used with varying meanings throughout the PAA, including the exercise of powers under Part IV generally (ss 3(2), 14C, 79 and 80(2)(b)); the exercise of managerial powers and functions (s 13(2)); conduct in the industrial relations context (ss 40B and 50); conduct constituting a breach of discipline (s 84F(1)(a)); the conduct of persons under arrest (s 127(3)(b)); police operations under a public disorder declaration (s 135C(3); the exercise of police powers (s 137(5)); and legal claims or proceedings (ss 145(12), 161 and 162). That variety of usage demonstrates that the meaning of the term will and does vary throughout the legislation depending upon the context.

[27] *Fourthly*, that it would be improper for the Commissioner to proceed to retire a member under s 89(d), having already determined that the member is totally and permanently incapacitated under s 91(5), does not mean that the same may be said concerning the operation of s 91(6). Although there is no express prohibition on that course in s 91(5), it arises by implication from the structure of and the interaction between ss 91(5) and 91(6). Moreover, any purported adoption of that course would be precluded by the administrative law requirement that statutory powers must be exercised properly and reasonably. Conversely, the operation of s 91(6) is contingent on an assessment that the member is not totally and permanently incapacitated, and leaves open retirement on other grounds.

[28] The Plaintiff's analysis also invokes the principle of construction expressed in *Anthony Hordern and Sons v Amalgamated Clothing and Allied Trades Union of Australia* in the following terms.

When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.¹¹

[29] The principle was subsequently restated in *R v Wallis* by Dixon J (as his Honour then was) in these terms:

[A]n enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same subject matter is not to be done according to some other course.¹²

[30] The rationale underlying the principle is to ensure that where the legislature confers a specific power subject to limitations on its exercise, the holder of the power cannot resort to a general power in order to avoid or otherwise thwart those limitations. The Plaintiff contends that this principle applies to the operation of Part V of the PAA, by characterising s 91 as the provision dealing with a member's inability to efficiently or satisfactorily perform his or her duties referable specifically to a physical or mental condition, and ss 87 and 89 as provisions dealing generally with a member's inability to efficiently or satisfactorily perform his or her duties. In his written submissions, the Plaintiff says.

11 *Anthony Hordern and Sons v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at [7].

12 *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529 at 550.

As the description of these statutory processes show, the opinions necessary to initiate the exercise of the power in s 91(2) (“the member is unable to efficiently or satisfactorily perform the member's duties *because of a physical or mental condition*”) is a more specific subset of the general circumstances necessary to form an opinion for the purposes of s 87 (“is not fit to discharge, suited to perform or capable of efficiently performing, the duties the member is employed to perform”).

While each are concerned with the duties the member is employed to perform and with the member’s inability to efficiently or satisfactorily perform those duties, the relevant difference is the *cause* of the inability. Section 91 is concerned solely with the particular case which it summarises in the heading as “*medical incapacity*” and which means “because of a physical or mental condition”. Section 87 deals with inability to perform duties that includes matters of attitude, disposition, competence, ability, or where there is no apparent explanation for non-performance of duties.¹³

[31] While there is no doubt as to the existence of the principle, the Plaintiff’s characterisation of s 91 as the specific provision subject to express limitations, and ss 87 and 89 as general provisions, does not lead to the conclusion that ss 87 and 89 cannot be used in any case of incapacity for medical reasons. The only relevant limitations on the exercise of the power conferred by s 91 are that where the Commissioner determines the member to be totally and permanently incapacitated the actions which may be taken are as prescribed in s 91(5), and where the Commissioner determines that the member is not totally and permanently incapacitated the actions which may be taken are as prescribed in s 91(6). The Plaintiff’s contention that a member cannot take the benefit of the exercise of the interim powers pursuant to s 90 during the process under s 91¹⁴ is correct only where the

13 Plaintiff’s Written Submissions, 25 August 2023, pars [37]-[38].

14 Plaintiff’s Written Submissions, 25 August 2023, par [46](b)(iv).

Commissioner is proceeding under s 91(5) to retire the member on the ground of invalidity, and not otherwise.

[32] That distinction draws attention to the fact that s 91(5) is concerned with a quite different type and quality of incapacity to that which falls to be dealt with under ss 87, 89 and 91(6). While it may be accepted that s 91(5) precludes action involving retirement other than on the grounds of invalidity where the member in question is considered by the Commissioner to be totally and permanently incapacitated, there is otherwise no limitation on retirement action. For the reasons already described, the Commissioner did not in this process resort to ss 87 and 89 *instead of* s 91. So far as is relevant for the purpose of the *Hordern* analysis, s 91(6) authorises rather than precludes action under ss 87 and 89. That conclusion is in no way altered by the fact that ss 87 and 89 also have application to inability for other than medical causes.

[33] In his written submissions, the Plaintiff also contends:

[B]y negative implication, “*other action*” under s 91(6) does not extend to forming an intention to retire the member under s 89(d). Determining a member meets the statutory threshold of total and permanent incapacity is the pre-condition for empowering the Commissioner to retire the member (on the grounds of invalidity) under s 91(4). Having determined that the member’s medical incapacity does not meet that threshold, it cannot be the consequence that the Commissioner is *also* entitled to retire the member under s 89(d) but without either meeting the threshold or being entitled to the benefits that arise. The reference to “*other action*” under s 91(6) appropriately extends to permitting a transfer to other duties: s 89(c), which by this route enlivens entitlements to benefits under superannuation legislation. That is so because a member “who experiences a reduction in salary on the grounds of physical or mental incapacity may apply to the

Commissioner for payment of a continuing invalidity income benefit”: r 12 of the *NTGPASS Rules*. Apparently, a transfer under s 89, which follows a finding made under s 91(6) will engage that entitlement. Again, it can be seen that s 91(6) engages with that entitlement.¹⁵

[34] That negative implication is said to have the consequence that “different duties are imposed on the Commissioner and rights conferred on members under the two processes”, including by reference to the fact that:

A member cannot be retired on the grounds of invalidity under s 91 without the “approval” of the NT Commissioner of Superannuation under s 50 of the *Superannuation Act*.

The statutory intercession of this other statutory officer suggests starkly there was to be distinct treatment of this class of member.¹⁶

[35] These contentions also cannot be accepted. The negative implication for which the Plaintiff contends accepts that the Commissioner may validly exercise the powers under ss 87 and 89 where the member is unable to perform the member's duties efficiently or satisfactorily because of a physical or mental condition, including through the s 91(6) pathway, with the exception of action which may have some disadvantageous impact on a member’s entitlement to benefits under superannuation legislation. There is no basis for that construction appearing from the text of the provisions in Part V of the PAA. While it may be accepted that the text must be construed in context, as opposed to divorced from it,¹⁷ there is also nothing in the context which demands that result. At base, this is an argument that the proper construction of the legislation is governed by the consequences for

15 Plaintiff’s Written Submissions, 25 August 2023, par [34].

16 Plaintiff’s Written Submissions, 25 August 2023, par [46](b).

17 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14], [35]-[40], [81] and [92].

the Plaintiff rather than the plain and natural meaning of the text. That interpretive approach is legitimate only where the alternative would yield an objectively inappropriate result and be plainly inconsistent with the legislative intention. This is not a matter where the literal interpretation would create an unsatisfactory and unintended regime, and no alternative interpretation is available without what is sometimes described as “grammatical surgery”.

[36] The negative implication asserted by the Plaintiff requires the words “such other action under this Part as the Commissioner thinks appropriate” appearing in s 91(6) of the PAA to be qualified by “other than an action under s 89(d)”, or perhaps more specifically, “other than an action which would yield a superannuation benefit less than that payable for physical or mental incapacity”. There is nothing in the extrinsic materials to suggest that the text does not accurately conform to the subjective intentions of the drafter and the legislature; and nor is this a case in which the inadvertent use or omission of words by the legislature makes it patently necessary to read words into the legislation in order to achieve the purpose of the Act.

[37] In addition, the construction pressed by the Plaintiff would not advance the purpose of the provisions. The Plaintiff’s assertion is, in essence, that the requirement to consider the provisions of superannuation legislation on retirement for total and permanent incapacity impliedly excludes retirement for any other medical reason because there is no requirement under s 89(d) of the PAA to consider the impact of that action on a member’s entitlement

to benefits under superannuation legislation. There is a good reason why the obligation on the Commissioner to consider the provisions of any superannuation legislation applying to the member appears in s 91(5) of the PAA, and not in s 91(6). That reason is directed to the proper administration of the Northern Territory Government and Public Authorities' Superannuation Scheme and the Northern Territory Government Death and Invalidity Scheme, rather than to the member's interests.

[38] The Commissioner's facility to retire a member under s 91(5) of the PAA on the "grounds of invalidity" after finding that a member is totally and permanently incapacitated must comply with the provisions of the *Superannuation Act 1986* (NT). Section 50 of the *Superannuation Act* provides:

Notwithstanding any other law in force in the Territory or the terms or conditions of any contract, a member of either Scheme shall not be retired from his or her employment on the grounds of invalidity unless his or her employer has first obtained from the Commissioner [of Superannuation] the Commissioner's approval in writing to the retirement.

[39] The reference to "either Scheme" includes both the Northern Territory Government and Public Authorities' Superannuation Scheme and the Northern Territory Government Death and Invalidity Scheme. The Scheme to which an employee belongs will depend upon whether the employment commenced before or after 9 August 1999, but under either Scheme a member may not be retired on the grounds of invalidity unless his or her employer, which in this case and for these purposes is the Commissioner of

Police, has obtained the approval of the Commissioner of Superannuation. The clear purpose of that provision is to protect the Schemes from depletion by the payment of invalidity retirement benefits other than in appropriate circumstances, and by a failure to pursue any recovery which may be available from other entitlements.

[40] In particular, the approval mechanism allows the Commissioner of Superannuation to be satisfied on the relevant medical and other evidence that the member is physically or mentally incapacitated to such a degree as to be unfit for any employment for which the member is reasonably qualified by education, training or experience, and to ensure that any entitlement to periodic payments for loss of earning capacity under workers' compensation legislation is set off against the invalidity retirement benefit which would otherwise be payable.¹⁸ A number of distinctions must be drawn between the respective operations of ss 91(5) and (6) of the PAA in these respects.

[41] *First*, and contrary to the Plaintiff's submissions,¹⁹ the inquiry into total and permanent incapacity is directed to the member's ability to work in any employment for which the member is reasonably qualified by education, training or experience, rather than to the narrower question of whether the member has an inability to resume police duties.²⁰ That distinguishes the

18 See *Superannuation Act*, s 45F, s 45Q; *Northern Territory Government and Public Authorities' Superannuation Scheme Rules 1986* (NT), r 10.

19 Plaintiff's Written Submissions, 25 August 2023, pars [25] and [31].

20 PAA, s 91(1).

operation of s 91(5) from the balance of Part V, and the reference in s 91(5) to the Commissioner taking such other action under Part V as the Commissioner thinks appropriate is necessarily subject to a limitation arising from the text of the provision. That is, it is a precondition to the Commissioner taking action that he or she has determined that the member is totally and permanently incapacitated, which by necessary implication precludes action involving retirement other than on the grounds of invalidity or transferring the member to other duties.

[42] *Secondly*, there is no such limitation arising by implication from the text of s 91(6), because action under that section is predicated on an inability falling short of invalidity in the sense of total and permanent incapacity. Action under that provision, including retirement on the grounds of an inability to perform the duties of a police officer efficiently or satisfactorily, would not deprive the member in question from any continuing entitlement to periodic payments for loss of earning capacity under workers' compensation legislation, or of the ability to engage in any other employment for which the member is reasonably qualified by education, training or experience. Moreover, the criterion of an inability to perform "duties efficiently or satisfactorily" appearing in s 91(6) both replicates and references one of the grounds on which the Commissioner may form an opinion concerning inability under s 87 of the PAA.

[43] *Thirdly*, while it is correct to say that a member of the Northern Territory Government and Public Authorities' Superannuation Scheme who

experiences a reduction in salary on the grounds of physical or mental incapacity may apply to the Commissioner of Superannuation for payment of a “continuing invalidity income benefit”,²¹ the availability of such a benefit does not constrain the action which may be taken under s 91(6) of the PAA, either expressly or by necessary implication. So much follows from: (a) the fact that s 91(6) makes no reference to a consideration of “the provisions of any superannuation legislation”; (b) from the fact that such a benefit would be by definition unavailable if the member was retired under s 91(5) of the PAA, which is the provision that does make express reference to “superannuation legislation”; and (c) from the obvious operational imperative in a quasi-military organisation such as a police force that a member’s continuing performance of duties at a lower rate of salary is governed by the Commissioner’s determination of whether the member is able to perform those duties efficiently or satisfactorily, rather than the potential availability of some “top-up” income benefit.

[44] *Fourthly*, there is no provision for a “continuing invalidity income benefit”, or any comparable benefit, for members of the Northern Territory Government Death and Invalidity Scheme.²² If the availability of that benefit was the basis of an implication precluding retirement under s 89(d) of the PAA for medical incapacity falling short of total and permanent

21 See *Northern Territory Government and Public Authorities’ Superannuation Scheme Rules*, r 12.

22 See *Superannuation Act*, s 45M, s 45Q.

incapacity, Part V would have a differential operation dependent on whether the member's employment commenced before or after 9 August 1999.

[45] *Fifthly*, and contrary to the Plaintiff's written submissions,²³ the Commissioner is not under a duty to facilitate the member resuming his or her duties. Such a duty plainly does not and cannot arise under the specific power to retire in s 91(5) of the PAA. Section 91(6) provides that if a member is not determined to be totally and permanently incapacitated, "the Commissioner shall take whatever steps he considers reasonable and practicable to facilitate the member resuming those duties or take such other action under this Part as the Commissioner thinks appropriate". The use of "or" as the conjunction expressly recognises that there is no compulsion on the Commissioner to take steps to facilitate the member's resumption of duties. That is no doubt because the history and reasons underlying the assessment of an inability to perform those duties efficiently or satisfactorily will in some cases militate against the adoption of that course. While it may be accepted that the assessment cannot be conducted on an arbitrary basis, and that there may be concomitant obligations under the workers' compensation legislation, s 91(6) of the PAA does not impose a duty or obligation on the Commissioner to take steps to facilitate the member returning to work before or instead of taking "other action" under Part V.

23 Plaintiff's Written Submissions, 25 August 2023, pars [46](a)(ii) and [49].

[46] Rather than establishing two distinct processes with a clear “structural separation”, on proper analysis the scheme in Part V is an integrated regime which deals with inability for both medical and non-medical reasons. As the Commissioner has submitted, there is nothing novel, unusual or necessarily limiting about the coexistence of two processes which may in some circumstances overlap.²⁴ Although Part V creates two mechanisms or pathways for dealing with inability, it also provides expressly for the harmonious confluence of those processes in circumstances where an inability for medical reasons is assessed to fall short of total and permanent incapacity. That is the clear purpose of the formulation appearing in s 91(6) permitting the Commissioner to “take such other action under [Part V] as the Commissioner thinks appropriate”. That purpose does not deny s 87 independent and exclusive operation in relation to inability for other than medical reasons.

[47] One of the reasons proffered in support of the application for the statement of a case for consideration by the Full Court was the suggestion of a conflict between the two single-Judge decisions of the Supreme Court in *R v Bates*; *Ex parte O'Brien*²⁵ and *Commissioner of Police v Farquhar*²⁶. The plaintiff relies in particular on the following passage from *Bates*:

Mr Reeves submitted that s 91 was restricted to cases of total and permanent incapacity arising on medical grounds, while partial

²⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [2].

²⁵ *R v Bates*; *Ex parte O'Brien* [1997] NTSC 91; (1997) 140 FLR 128.

²⁶ *Commissioner of Police v Farquhar* [2010] NTSC 61.

incapacity on medical grounds could be a basis for pars (a) or (b) or (c) in s 87; however, I consider that such cases are expressly and exclusively provided for in s 91(6). I consider that s 91 is a wholly self-contained provision instituting a procedure for dealing with a member's medical incapacity. Although s 86 provided that Part V did "not apply" to "medical incapacity", that appears to be a drafting error, the intention probably being that the procedure for dealing with non-medical 'inability' in s 87, as set out in ss 87-90, should not apply to a case of medical incapacity, the procedure for dealing with the latter being set out in s 91.

[48] These remarks were *obiter*, and do not examine the textual and functional relationship between s 91 and ss 87 and 89. In the subsequent decision in *Farquhar*, Mildren J declined to adopt that approach and reached the opposite conclusion in saying:

That being so, I take the view that, unlike the view of Kearney J, in a case where the inability of the member to discharge the duties is not because of total incapacity but perhaps because of a partial incapacity, the Commissioner may nevertheless proceed under s 87.

[49] The Plaintiff submits that *Farquhar* ought not be followed in this respect. In his written submissions, the Plaintiff contended:

The analysis in *Farquhar*, with respect, proceeds from a mistaken premise. It does not acknowledge that after identifying that two statutory power are conferred, one general and the other specific, it is necessary to address the application of the principle in *Anthony Hordern*. Moreover, it does not mention nor address the difference in duties on the Commissioner, and rights of members that arise from the formation of an opinion under s 91 which do not apply to a process undertaken under s 87 – and indeed the different consequences attached to that process arising under s 90.²⁷

[50] The application of the principle in *Anthony Hordern* has already been dealt with above. For reasons which have also been described, the “rights of members” under the provisions of any superannuation legislation do not

²⁷ Plaintiff's Written Submissions, 25 August 2023, par [55].

govern the proper construction of Part V. As Mildren J pointed out in *Farquhar*, the legislative duties imposed on the Commissioner by s 91 of the PAA do not thereby confer rights on the members. In relation to that, Mildren J said:

It would seem that the purpose of conferring a discretion is to require the Commissioner, or the prescribed member, as the case may be, to consider whether or not to proceed under s 91(2). If the Commissioner or the prescribed member has failed to consider it at all, then administrative remedies would lie. If on the other hand, the Commissioner has considered it but he has not considered it properly, then the Commissioner's decision not to proceed by way of s 91 may be challenged by writ of mandamus on *Wednesbury* unreasonableness grounds.

It seems to me that there is no absolute entitlement on the part of a person who is unfortunate enough to find himself or herself unable to efficiently or satisfactorily perform his or her duties because of a physical or mental condition, to require the Commissioner to do more.²⁸

[51] To that may be added the qualification that it might appear to the Commissioner during the course of a process commenced under s 87 of the PAA, including on the basis of a medical examination conducted pursuant to s 88, that there is some reasonable ground for apprehending that the member is totally and permanently incapacitated. Although it is unnecessary to decide the matter for present purposes, the formation of that opinion might require the Commissioner to proceed thereafter under s 91 of the PAA.

Financial consequences

[52] If the answer to question 1 is “yes”, as we have determined, the second question of law referred is whether the exercise of power by the

28 *Commissioner of Police v Farquhar* [2010] NTSC 61 at [28].

Commissioner under ss 87 and 89 of the PAA is conditioned by an obligation to consider the financial consequences for the member described in s 91(5) and/or the taking of “steps” to facilitate the member returning to duties in s 91(6) of the PAA. The Plaintiff’s contention in this respect is that if s 87 does have application to incapacity caused by a physical or mental condition, the power in ss 87 and 89 should be construed as “limited by the additional conditions and restrictions on retirement, and the taking of other action, as provided for in s 91”. That resolves to the assertion that the PAA ought be construed such that the entitlements of a member who has an incapacity because of a physical and mental condition ought be the same *irrespective* of the level of incapacity and the power to be exercised.

[53] The broader premises and constructional arguments which underlie the Plaintiff's contention in this respect have already been addressed in dealing with the first question referred. *First*, the requirement under s 91(5) that the Commissioner consider the provisions of any superannuation legislation arises only where the member has been assessed as totally and permanently incapacitated. There is no such requirement, much less any corresponding right or entitlement, in circumstances where the Commissioner has determined that the member is not totally and permanently incapacitated. *Secondly*, s 91(6) of the PAA does not impose a duty or obligation on the Commissioner to take steps to facilitate the member returning to work before or instead of taking “other action” under Part V. *Thirdly*, the obligations imposed on the Commissioner under s 91 of the PAA do not

otherwise give rise to rights and entitlements on the part of the member concerned in the manner and with the effect that the Plaintiff asserts.

[54] The Plaintiff's argument in this respect is based upon the principle that where separate pieces of legislation provide for broadly equivalent powers running in tandem but independently of each other, the exercise of one of those powers must be read as subject to any relevant condition or restriction imposed in relation to the exercise of the equivalent power. There are a number of difficulties with the application of that principle to the present circumstances. *First*, to the extent that the principle relies on what was said in *Gibson v Ellis*,²⁹ that was a case which involved powers of search conferred by both summary offences legislation and misuse of drugs legislation. This is a case in which the powers in question appear in the same part of a single piece of legislation, which have a harmonious and complementary operation for reasons already described in the context of the first question. *Secondly*, it was a minority opinion in *Gibson v Ellis* that the higher threshold for the valid exercise of the power in the misuse of drugs legislation governed both powers. That opinion was not subsequently followed.³⁰ *Thirdly*, there is no equivalence between the power in s 89 and the power in either s 91(5) or s 91(6) of the PAA. For the purpose of this analysis, their respective operations are sometimes as alternatives and sometimes as adjuncts.

29 *Gibson v Ellis* (1992) 59 SASR 420 at 426.

30 See *R v Fazio* (1997) 69 SASR 54 at 58-59.

Duties a member is employed to perform

[55] If the answer to question 1 is “yes”, as we have determined, the third question of law referred is whether, in forming an “opinion” for the purposes of s 87(a) and s 89 on the basis of a “physical or mental condition”, the expression in s 87(a) the “duties the member was employed to perform” refers to all duties of a police officer that a member might be directed to perform. This question in its present form was not among the issues originally referred by the trial judge to the Full Court. The question is obviously directed to the findings made by the Inability Appeal Board in the following terms:

The Board considers that the duties the member is required to perform as it appears in s 87 should be interpreted to mean requiring the member to be mentally and physically ready and capable of performing all of their statutory functions, up to and including the application of lethal force.

The oath sworn by Police officers does not differentiate by rank or position and nor does the PAA as it applies broad immunity and protection from civil and criminal liability for acts done and omitted to be done by members in good faith in the performance of their functions. Likewise, the PAA does not distinguish between operational [and] non-operational duties.

In these circumstances, the Board considers that the PAA requires that Police Officers will at all times be fit to discharge, suited to perform and capable of efficiently performing all of the necessary statutory duties, as opposed to involving a question of whether a member may be fit to discharge some form of modified or restricted duties that may necessarily exclude the inherent requirements of the job.³¹

[56] The Plaintiff had argued that “the duties the member is employed to perform” extended to such modified or restricted duties as the member was able to perform, and therefore precluded the formation of an opinion of

31 Decision of the Inability Appeal Board, 25 July 2022, [34]-[36].

unfitness, unsuitability or incapability on reasonable grounds if the plaintiff was able to perform restricted or non-operational duties. The difficulty with the question as it is presently framed is that it is ambiguous in the sense that it might be taken to refer to duties the member was performing or had been directed to perform, or to refer to some unspecified category of duties that any member of the police force could be directed to perform. The first of those scenarios is not open on the uncontested facts, and the second scenario does not reflect the Commissioner's position at any stage in the proceedings. In particular, the answer to the question as presently framed would not necessarily be determinative of whether the Commissioner had reasonable grounds to form a relevant opinion under s 87(a), or whether the Commissioner had an obligation to transfer the Plaintiff to "other duties" under s 89 rather than retiring him.

[57] Lying at the base of the Plaintiff's case in this respect is that s 75A of the *Return to Work Act 1986* (NT) casts an obligation on the Commissioner as employer to take reasonable steps to ensure that an injured worker is provided suitable employment commensurate with his or her residual capacity. The question as presently framed does not invite a consideration of that issue, at least not in any patent way. That difficulty was recognised by the Plaintiff during the course of the hearing by his counsel's suggestion that the question be reformulated in the following terms:

Do the expressions "the duties the member is employed to perform" in s 87(a) and "other duties" in s 89(c) comprise any and all duties that a

member would be fit to perform, or does it include all general duties irrespective of the effect of s 75A of the *Return to Work Act*?

[58] The Commissioner’s suggested reformulation is:

Is the phrase “the duties the member is employed to perform” in s 87(a) qualified by s 75A of the *Return to Work Act* such that it cannot include operational duties in circumstances where the member is unfit to perform operational duties [by reason of work-related injury]?

[59] The first of these reformulated questions assumes some form of operational inconsistency between the inability provisions of the PAA and the employer’s obligations under the *Return to Work Act*. As the Commissioner has submitted, sworn members of the police force exercise independent authority in the exercise of their statutory and common law powers.³² That authority is coupled with a duty to exercise those powers in the enforcement of the law, the maintenance of social order and the protection of the community.³³ The duties a sworn member of the police force is employed to perform include the full range of those operational duties, even allowing for the fact that a member may at various times be deployed on non-operational duties or in a role which does not require the discharge of the full range of those powers and functions. The ambit of the phrase “the duties the member is employed to perform” in s 87(a) must be understood in that light.

[60] The Commissioner cannot be precluded from forming an opinion under s 87 of the PAA on the basis that a member is unfit, for whatever reason, to

32 *R v Rolfe (No 5)* [2021] NTSCFC 6 at [28], [33]; *Enever v The King* (1905) 3 CLR 969.

33 PAA, ss 25, 26 and 28; *R v Rolfe (No 5)* [2021] NTSCFC 6 at [108]-[110]; *New South Wales v Tyszyk* [2008] NSWCA 107 at [55]-[114].

perform the full range of those duties. Whether that opinion is formed on reasonable grounds will depend upon the circumstances of the particular matter, including the nature and duration of the incapacity in question. The formation of that opinion, and the action taken in consequence, does not bear on the operation of the *Return to Work Act*. Action taken by the Commissioner under Part V will not affect a member's entitlement to the payment of compensation for work-related injury (except to the extent that it bears on the calculation of loss of earning capacity); and nor does it have any necessary bearing on the employer's obligation to take reasonable steps to provide suitable alternative employment or retraining. However, s 75A of the *Return to Work Act* does not operate to compel the Commissioner to retain a person as a sworn member of the police force where to do so would be inconsistent with the operational requirements of the organisation and incompatible with the discharge of the core functions of a police officer. At a more specific level, the facility for the transfer of a member to other duties under s 89(c) of the PAA is not coextensive with or functionally related to the obligations imposed by s 75A of the *Return to Work Act*.

[61] Beyond those general observations, the issues to which this question gives rise, including as sought to be reformulated by the parties, are best left to be dealt with by the trial judge according to the facts and circumstances which are found to subsist in the course of the application for judicial review.

Answers to referred questions

[62] For the reasons given, the answers to the questions referred are:

Question 1:

Where the Commissioner of Police (the Commissioner), or a prescribed member has formed, or could reasonably form, the opinion that a member is “unable to efficiently or satisfactorily perform the members duties” because of a physical or mental condition (“medical incapacity”) within the meaning of s 91 of the *Police Administration Act 1978* (NT) (the PAA), may the Commissioner exercise the power under s 87(a) and s 89(d) of the PAA by reason of that medical incapacity to “advise the member in writing that the Commissioner intends to retire the member from the Police Force”?

Answer:

Yes.

Question 2:

If the answer to question 1 is “yes”, is the exercise of the power by the Commissioner to take action under s 87 and later s 89 conditioned by an obligation to consider the financial consequences for the member described in s 91(5) and/or the taking of “steps” to facilitate the member returning to duties in s 91(6) of the PAA?

Answer:

No.

Question 3:

If the answer to question 1 is “yes”, in forming an “opinion” for the purposes of s 87(a) and s 89 on the basis of a “physical or mental condition”, does the expression in s 87(a) the “duties the member was employed to perform” refer to all duties of a Police officer that a member might be directed to perform?

Answer:

This question is not suitably framed for an answer on reference. At a general level, the duties a sworn member of the police force is employed to perform include the full range of his or her statutory and common law powers and functions, even allowing for the fact that a member may at various times be deployed on non-operational duties. Section 75A of the *Return to Work Act* does not compel the Commissioner to retain a person as a sworn member of the police force if that person is unfit, unsuited or incapable to perform the core functions of a police officer.