

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH  
WALES

BETWEEN:

**SAS TRUSTEE CORPORATION**  
Appellant

and

**PETER MILES**  
Respondent



**APPELLANT'S SUBMISSIONS**

**Part I: CERTIFICATION**

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1. SAS Trustee Corporation (the **appellant**) certifies that these submissions are in a form suitable for publication on the internet.

**Part II: ISSUES**

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2. This appeal presents the issue of whether the Court of Appeal erred in construing s 10(1A)(b) of the *Police Regulation (Superannuation) Act 1906* (NSW) (the **Act**) as requiring the payment of additional amounts of superannuation allowance where the relevant incapacity for work outside the police force giving rise to the claim is not due to an infirmity determined by the Commissioner of Police under s 10B(3) to have been caused by the claimant having been hurt on duty.

**Part III: s 78B NOTICE**

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3. The appellant does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

**Part IV: DECISIONS BELOW**

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4. The medium neutral citation of the decision of the primary judge is *Miles v SASTC* [2016] NSWDC 56 (**PJ**). It is reported as *Miles v SAS Trustee Corporation* (2016) DCLR (NSW) 223.
5. The medium neutral citation of the decision of the Court of Appeal is *Miles v SAS Trustee Corporation* [2017] NSWCA 86 (**CA**). This decision is not reported as at the date of these submissions.

## Part V: FACTS

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### (a) Factual background

6. On 28 August 2003, Mr Miles (the **respondent**) was certified pursuant to s 10B(1) of the Act as being incapable, from four specified infirmities of an orthopaedic nature, of discharging the duties of his office as a police officer.<sup>1</sup>

7. On 5 September 2003, the respondent was medically discharged from the police force upon determination by a delegate of the Commissioner of Police of 4 September 2013, pursuant to s 10B(3)(a) of the Act, as follows:<sup>2</sup>

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*The suffering by Senior Constable Miles of the infirmity of **Cervical spine – symptomatic degenerative changes; lumbar spine – symptomatic degenerative changes; left shoulder – recurrent dislocation; and right knee – symptomatic chondromalacia** as specified in the certificate of the Police Superannuation Advisory Committee, dated 28 August 2003, was caused by the member being hurt on duty.* (emphasis in original).

8. Importantly, the respondent was not certified and/or discharged for any psychiatric problem.<sup>3</sup>

9. As a consequence of the certification for the orthopaedic infirmities and subsequent determination by the Commissioner, the respondent became entitled, pursuant to s 10(1A)(a) of the Act, to an annual superannuation allowance (**pension entitlement**) equal to 72.75% of his attributed salary of office.<sup>4</sup>

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10. In 2004, the respondent sought an increase pursuant to s 10(1A)(b) of the Act to his pension entitlement, in relation to which, on 30 September 2004, the appellant determined that the respondent was entitled to a total pension entitlement of 81% of his salary of office.<sup>5</sup>

11. On 2 February 2006, that decision was set aside by the District Court, and in lieu thereof the respondent's total pension entitlement was determined to be 82.55% of his salary of office,<sup>6</sup> as a result of being 80% incapacitated.<sup>7</sup>

12. The District Court's 2006 determination that the respondent was entitled to an increase to 82.55% was in relation to incapacity caused by his certified orthopaedic infirmities, suffered through being hurt on duty, for which he was medically discharged.<sup>8</sup>

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<sup>1</sup> CA [20] (Sackville AJA).

<sup>2</sup> CA [20] (Sackville AJA).

<sup>3</sup> PJ [29].

<sup>4</sup> CA [22] (Sackville AJA).

<sup>5</sup> CA [23] (Sackville AJA).

<sup>6</sup> CA [23] (Sackville AJA).

<sup>7</sup> PJ [29]; The relevant calculation is that the percentage incapacity for work outside the police force is determined under s 10(1A)(b)(ii), and that percentage of 12.25% (by reference to s 10(1A)(b)(i)) is added as an additional amount to 72.75% which is the base level payable in s 10(1A)(a); *Lembcke v SAS Trustee Corporation* [2003] NSWCA 136 at [16] (Santow JA with whom Meagher and Ipp JJA agreed). Thus in 2006, when the District Court determined the respondent's incapacity to be 80%, the relevant amount to be added to 72.75% was 9.8% (80% of 12.25%), resulting in the determination of entitlement at 82.55% of his salary of office.

<sup>8</sup> See eg District Court decision of 2 February 20026, annexed as Annexure A to District Court decision of 11 April 2016, at [2]-[4]; [6]-[7] (describing that the respondent was examined by an orthopaedic surgeon); [8]-[9] (where a rehabilitation physician was described to provide "good diagnoses of the plaintiff's medical conditions consistent

13. In 2008, the respondent made an application to the appellant for his psychiatric condition (PTSD) to be included on his certificate of discharge, which was rejected.<sup>9</sup> A further application in 2009 to amend the original certificate was similarly rejected.<sup>10</sup> The respondent appealed this decision to the Industrial Court of New South Wales, and the appeal was dismissed.<sup>11</sup> The Full Bench of the Industrial Court granted leave to appeal from the single judge decision, but a majority also dismissed that appeal.<sup>12</sup>
14. Thereafter, by letter dated 12 November 2013, the respondent applied again to the appellant to have his pension entitlement increased pursuant to s 10(1A)(b) of the Act to 85% of his salary of office.<sup>13</sup>
- 10 15. On 2 February 2015, the appellant notified the respondent that it had declined to increase the respondent's pension entitlement above the rate fixed on 2 February 2006.<sup>14</sup>

**(b) Decision of the District Court**

16. On 18 June 2015, the respondent commenced proceedings in the District Court pursuant to s 21(1) of the Act, seeking a determination by the District Court in relation to the appellant's 2 February 2015 decision. The District Court's decision was handed down on 11 April 2016.
17. His Honour, Neilson DCJ, considered the medical evidence, concluding that the respondent had not proved any material change of circumstance in the four orthopaedic problems certified by the appellant and accepted by the Commissioner as having been caused by the plaintiff's having been hurt on duty: PJ [58]. His Honour had already noted that the respondent's application to include a psychiatric condition on his certificate of discharge had been rejected, including on appeal: PJ [31]. The respondent's claim for an increase in the rate of pension therefore came down to whether or not any psychiatric incapacity could be taken into account, which turned on the question of statutory construction which is the subject of this appeal.
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18. His Honour's approach to that question, and that of the Court of Appeal, will be considered when the applicable principles and statutory provisions have been considered.

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with the opinion of the Police Superannuation Advisory Committee which certified the plaintiff's infirmities"); [10] (review by an occupational physician who described "four regions of musculoskeletal disorders"); [14] (reference to "ongoing and chronic problems in his knee, low back, left shoulder and right knee"); [45] (reference to "physical capacity").

<sup>9</sup> CA [24] (Sackville AJA).

<sup>10</sup> CA [25] (Sackville AJA).

<sup>11</sup> CA [25] (Sackville AJA) (citing *Miles v SAS Trustee Corporation* [2010] NSWIRComm 69).

<sup>12</sup> CA [25] (Sackville AJA) (citing *Miles v SAS Trustee Corporation* (2011) 206 IR 164).

<sup>13</sup> CA [27] (Sackville AJA).

<sup>14</sup> CA [27] (Sackville AJA).

## Part VI: ARGUMENT

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### (a) Principles of statutory construction

19. The appellant contends that the correct approach to statutory construction is to read text in context, and that the majority in the Court of Appeal erred by construing the text of s 10(1A)(b) before considering context. These submissions review the authorities, analyse the legislation, then address the approach to construction adopted by the trial judge and the court below.

20. In *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 (citations omitted), Mason J stated as follows:

10 [T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.

21. This was adopted by Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384 at 408:

20 The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

30 22. This approach was reiterated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] where McHugh, Gummow, Kirby and Hayne JJ stated: "the process of construction must always begin by examining the context of the provision that is being construed".<sup>15</sup>

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<sup>15</sup> See also [70]-[71], [78].

23. While several decisions of the Court<sup>16</sup> since then have been described as reflecting “changes in nuance and emphasis”,<sup>17</sup> these decisions do not disclose an intention to relegate context to consideration at some later stage of the analysis of the statute. To the contrary, recent decisions of the Court, including prior to argument in the Court of Appeal decision in the present case, expressly require that context be considered from the outset, not later.<sup>18</sup> For example, in *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] (**Thiess**), citing *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] the Court stated:

10 This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

24. To the same effect is *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (**SZTAL**), handed down after the Court of Appeal’s decision. Kiefel CJ, Nettle and Gordon JJ stated at [14]:<sup>19</sup>

20 The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

25. As noted by Gageler J at [38] (footnotes omitted):

30 The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from “a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural”, in which case the choice “turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.”

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<sup>16</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46-7 [47] (**Alcan**); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [33].

<sup>17</sup> J J Spigelman, “The Intolerable Wrestle: Developments in Statutory Interpretation” (2010) 84 *ALJ* 822, 828.

<sup>18</sup> See eg, *Taylor v The Owners - Strata Plan No 11564* (2014) 253 CLR 531 at 556 [65] (“Statutory construction involves attribution of legal meaning to statutory text, read in context”); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11], where *Alcan* was cited in support of the proposition that a statute’s “construction will give effect to the ordinary meaning of its text in the wider statutory context and with reference to the purpose of the provision.”; *Comcare v Martin* (2016) 258 CLR 467 at 479 [42] (“the application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects is statutory purpose.”)

<sup>19</sup> See also Gageler J at [37].

26. There may be a perceived tension between statements such as those quoted from *Project Blue Sky* and *K&S Lake City Freighters* on the one hand, which suggest a need to start with context, and cases which suggest an emphasis on text, read in context. But the cases are consistent in stating that the correct approach is to read text in its context before making constructional choices, in contradistinction to construing the text of the key provision, then assessing the construction so arrived at for consistency with context.

(b) **Interpretation Act 1987, and authorities on purpose**

- 10 27. Relevant to these principles is the operation of s 33 the *Interpretation Act 1987* (NSW) (*Interpretation Act*), which requires that a construction which promotes the purposes or object of the underlying Act (even if that purpose or object is not expressly stated in the Act) shall be preferred to a construction that would not promote that purpose or object.<sup>20</sup>
28. In *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 at [10], the plurality observed that the “question of construction is determined by reference to the text, context and purpose of the Act.”
29. In *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said at [44]:
- 20 The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.
30. In *Maritime Union of Australia v Minister for Immigration and Border Protection* [2016] HCA 34, (2016) 90 ALJR 1004 at [25], [34], it was confirmed that purpose can be gleaned through consideration of text and context, and confirmed by the use of extrinsic materials.<sup>21</sup>
31. In NSW, extrinsic materials may be referred to either to confirm that the meaning of the provision is the ordinary meaning conveyed by the text (s 34(1)(a) of the *Interpretation Act*), or to determine the meaning of the provision if it is ambiguous or obscure (s 34(1)(b)(i)), or if the ordinary meaning leads to a result that is manifestly absurd or is unreasonable: s 34(1)(b)(ii).
- 30 32. In relation to headings, though s 35(2)(a) of the *Interpretation Act* provides that a heading to a provision of an Act shall be taken not to be a part of the Act, s 35(5) states: “This section does not limit the application of section 34 in relation to the use of any heading, marginal note, footnote or endnote in the interpretation of the provision to which the heading, marginal note, footnote or endnote relates.”

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<sup>20</sup> This provision is reflected in s 15AA of the *Acts Interpretation Act 1901* (Cth). See also *Thiess* at [23] per the Court (“Objective discernment of statutory purpose is integral to contextual construction.”); *SZTAL* at [39] per Gageler J.

<sup>21</sup> See also at [30] (“If there were any doubt about that, it is excluded by the extrinsic materials to which reference has already been made”)

33. Section 34(2)(a) of the *Interpretation Act* in turn states that “all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer” may be considered in the interpretation of a provision of an Act.
34. In *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [40], Gaudron, Gummow and Callinan JJ stated that:

[the marginal note], whilst not forming part of the Act, is set out in the document containing the text of the Act as printed by the Government Printer. Therefore, as indicated in *Darling Casino Ltd v NSW Casino Control Authority*, such material may be considered in the interpretation of s 46. That follows from par (a) of s 34(2) of the *Interpretation Act*. The marginal note is capable of assisting in the ascertainment of the meaning of the section. Consideration may be given to it for such purposes as to confirm that the meaning is the ordinary meaning conveyed by the text, taking into account its context in the statute and the purpose or object underlying the statute (s 34(1)(a)) and to determine the meaning of the provision if it is ambiguous (s 34(1)(b)(i)).

35. *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 considered the use of headings. Gaudron and Gummow JJ stated (at 621):<sup>22</sup>

The structure of the Act supports the construction of s 9 and s 10 as distinct stages and the work of s 9 is completed once applications are invited under s 10. This is confirmed by reference to the respective headings of the sections. Section 9 is headed “Authority may invite expressions of interest” and s 10 is headed “Application for casino licence”.

36. The headings to ss 7 and 8, and ss 10 and 10B (as will be set out shortly) are important context in ascertaining the scope, object and purpose reflected in the structure of the Act.

**(c) Section 10(1A)(b) construed in context**

37. Consistently with the principles outlined above, s 10(1A)(b) falls to be construed within the wider context of the two streams of entitlement for which the Act provides in ss 7 and 8, and in ss 10 to 10C; the specific context of the definition of “disabled member of the police force” in s 10, which draws the certification and determination requirements from s 10B into the heart of s 10(1A) itself, and the terms of s 10(1A)(a) and (c); and the legislative history and extrinsic materials.

38. The Act provides for two separate streams of entitlement to annual superannuation allowances, the first in s 7 and s 8 dealing with allowance upon retirement or discharge for incapacity other than that arising from being hurt on duty, the second in s 10 to s 10C dealing with incapacity from a specified infirmity where the member is hurt on duty.

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<sup>22</sup> With reference in footnote 9 to ss 34 and 35 of the *Interpretation Act*.

39. In s 7 and s 8, the first scheme, provision is made for an annual superannuation allowance for a member under s 7, who after 20 years or more of relevant service retires upon reaching 60 years or is discharged after being certified under s 8 as being “incapable, from infirmity of body or mind, of personally exercising the functions of a police officer”. Section 7 is entitled “Superannuation allowance except where member hurt on duty”, and s 8 headed “Determination of members medically unfit”.
40. The maximum rate payable pursuant to s 7 is 72.75% salary of office: s 7(1), and table. Section 7(2) mandates that an annual superannuation allowance under s 7(1) “shall not be payable to a member of the police force to whom an annual superannuation allowance is payable under section 10.”
41. The second scheme, in s 10 to s 10C, makes provision for a higher rate of benefits applicable to members or former members in relation to whom the Commissioner of Police has determined that their certified infirmities were caused by the member being hurt on duty. Section 10 is entitled “Superannuation allowance where member hurt on duty”.
42. To attract the operation of s 10, the member must fall within the definition of “disabled member of the police force” which in turn focuses upon the application of s 10B. Section 10B is entitled “Medical examination of disabled member and determination of whether hurt on duty”.
43. Like s 8, s 10B contains a prohibition in (1) and (2) on granting an allowance “unless STC has certified the member to be incapable...of personally exercising the functions of a police officer.” The two subsections apply respectively to members who are discharged (subs (1)), or to members who resign or retire (subs (2)).
44. However, ss 10B(1) and 10B(2) have a critical difference from s 8, in that the member or former member must be certified to be incapable from a “specified” infirmity or “that” infirmity, respectively. In the latter case, the reference to “that infirmity” picks up the reference in s 10B(2)(a) to a requirement of notification to the Commissioner of Police of the injury which caused *the infirmity* before resignation or retirement and within six months of receiving the injury.<sup>23</sup> The apparent purpose of that requirement is to permit factual investigation of the incident leading to injury, to support the determination function of the Commissioner under s 10B(3).
45. Section 10B(3)(a) states that where a member or former member of the police force has been certified under ss 10B(1) or (2), the Commissioner of Police must decide whether or not “the infirmity to which the certificate relates” – the “specified” infirmity or “that” infirmity – was caused by the member having been “hurt on duty”, and the date or dates on which that occurred.<sup>24</sup> The Commissioner is also required to give the member or former member written notification of the decision.

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<sup>23</sup> *SAS Trustee Corporation v Woollard* (2014) 86 NSWLR 367 at 382 [63] (Bathurst CJ).

<sup>24</sup> All of “hurt on duty”, “member of the police force” and “police force” are defined in s 1 of the Act.

46. Thus, when s 10B is read as a whole, its precise focus upon a particular injury and specific infirmity becomes clear, that is, an infirmity which is certified as having caused the member to be incapable, and which then becomes the subject of a “hurt on duty” determination by the Commissioner.
47. It is with that context firmly in mind that s 10 itself must be construed, given the definition of “disabled member of the police force” within s 10 refers expressly to s 10B and the “specified” infirmity (ie s 10B(1)) and “an” infirmity (ie s 10B(2)(a)), with “that” infirmity having been determined pursuant to s 10B(3) to have been caused by the member being hurt on duty. This is particularly so given that the “primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of the statute.”<sup>25</sup>
48. Turning to s 10(1A) itself, it is well settled that in construing s 10(1A), the definition of “disabled member of the police force” from s 10(1) must be read into the chapeau of s 10(1A): *R v Kelly* (2004) 218 CLR 216 at [103]; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [12].
49. Thus, the reference in the chapeau of s 10(1A) to “disabled member of the police force” picks up not only the whole of the definition in s 10(1), but in turn s 10B(1), (2) and (3). The ‘disabled member’ to which the chapeau refers is a member certified to be ‘incapable’ because of a specified infirmity under s 10B(1) or a particular infirmity under s 10B(2) and who has a determination from the Commissioner under s 10B(3).
50. A person who is so ‘incapable’ within the meaning of that term as incorporated into the chapeau of (1A) is then the subject of an assessment of his or her ‘incapacity’ within (1A)(b)(ii). Once (1A)(b)(ii) is read in context, the difficulty of giving the term ‘incapable’ as incorporated into the chapeau a different meaning to ‘incapacity’ in (ii) is stark. But the contextual difficulties in such a construction do not end there.
51. Section 10, and in particular s 10(1A), provides for the determination of benefits where a member is hurt on duty. This much is apparent not only from the incorporation of the definition of “disabled member of the police force”, but also from the heading to the section. The appellant is obliged to pay out of the fund those benefits provided by the Act pursuant to s 3(3)(a).
52. Section 10(1A) itself contains three subsections. Subsection (a) provides a base payment of 72.75% salary of office for a “disabled member of the police force”.
53. Subsection (b) then commences with the words “except where paragraph (c) applies”. Therefore, in order to determine whether s 10(1A)(b) applies, it is necessary first to have regard to the operation of s 10(1A)(c) to determine whether it applies. Paragraph (c) thus provides important context to the construction and operation of paragraph (b).

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<sup>25</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

54. Section 10(1A)(c) applies if the 'disabled member of the police force' is totally incapacitated, and, in the opinion of STC, the member was *hurt on duty* because of exposure to risks beyond those of the general workforce.
55. With the relevant enquiry under s 10(1A)(c) being whether, at the time of determining amount of the allowance, "the disabled member is totally *incapacitated*", the provision makes tolerably clear that the incapacity referred to is the same incapacity caused by the specified infirmity the subject of the s 10B(1) certification that brought the person within the definition in the chapeau.
- 10 56. Similarly, the "hurt on duty" in s 10(1A)(c) is the same "hurt on duty" already determined by the Commissioner under s 10B(3) to have caused "that" infirmity, with the appellant being required to consider at a later stage under s 10A(1)(c) whether that "hurt on duty" was "because the member was required to be exposed to risks which members of the general workforce would normally not be required to be exposed in the course of their employment."
57. When s 10(1A)(c) applies, an additional amount of between 12.25% and 27.25% is payable above the base level of 72.75%, equating to a total payment of between 85% and 100% of attributed salary of office.
58. Section 10(1A)(b) thus applies when the member is not totally incapacitated (but suffers from some incapacity for work outside the police force), or when the member is totally incapacitated but was not (in the opinion of STC) hurt on duty because the member was  
20 required to be exposed to risks to which members of the general workforce would normally not be required to be exposed.
59. The 'incapacity' referred to in s 10(1A)(b)(ii) is therefore the same incapacity referred to in s 10(1A)(c) ('totally incapacitated'). If, as shown above, the incapacity in (c) is one which is certified, and is the subject of a hurt on duty determination, then it follows that the "incapacity for work" referred to in s 10(1A)(b)(ii) must be that which led to the member being discharged after being certified under s 10B(1) or s 10B(2) "to be incapable, from a specified infirmity of body or mind, of personally exercising the functions of a police officer" in s 10(1), being that infirmity which has been determined under s 10B(3) as having been caused by being "hurt on duty".
- 30 *i. Legislative history and extrinsic materials*
60. As noted above, legislative history and extrinsic material form part of context: *Thiess* at [22].
61. Consideration of the legislative history and relevant extrinsic materials confirms the scheme set out above, and can properly be referred to in circumstances as set out by s 34(1) of the *Interpretation Act* to confirm what the appellant contends is the "ordinary" meaning of the section (s 34(1)(a)), or, given the ambiguity raised by the two competing interpretations that has resulted in this matter coming before this Court, to resolve that ambiguity: s 34(1)(b)(i).
62. Sections 10 to 10C of the Act were introduced by amendment in 1979, replacing differently-drafted provisions that allowed a maximum pension of 72.75% salary of office.

63. The *Police Regulation (Superannuation and Appeals) Amendment Act 1979* (the **Amendment Act**) had as its long title “An Act to amend... [three Acts] in relation to benefits payable where members of the police force are hurt on duty, and for other purposes” (emphasis added). The manifest purpose of the Amendment Act was to improve the provision made for police officers whose incapacity for work arose from activities arising out of or in the course of their duties as police officers.

10 64. This is reflected in the heading of s 10 as introduced, namely, “Superannuation allowance where member hurt on duty” (emphasis added). The heading to this section also assists in the interpretation of the provision,<sup>26</sup> and supports the interpretation contended for by the appellant.

65. The Explanatory Note and excerpts from the Parliamentary Second Reading Speeches to the Amendment Act are cited by the primary judge at PJ [78] to [80]. When read together, they support the appellant’s construction of s 10(1A)(b). The appellant refers this Court in particular to the following excerpt from p 1845 of Hansard (incompletely cited by Sackville AJA at CA [92]):

20 “The bill would provide a statutory minimum superannuation allowance of 72.75 per cent of salary. A member of the police force **whose disability also causes incapacity for work outside the police force** would be paid an amount in addition to the disablement allowance. The additional amount would not exceed 12.25 per cent of the salary of office and be commensurate with the extent of incapacity. However, in cases of total incapacity associated with exposure to exceptional risk, the additional amount would be no less than 12.25 per cent and no more than 27.25 per cent – the maximum allowance being therefore 100 per cent of salary. **The result would be that hurt-on-duty pensions could reflect the degree of incapacity suffered and also any exceptional risk undertaken.** (emphasis added)

30 66. Clearly, the intended touchstone for the additional amounts payable pursuant to ss 10(1A)(b) and 10(1A)(c) is the hurt-on-duty infirmity. The Second Reading Speech confirms that the “disability” causing “incapacity for work outside the police force” is plainly that which makes the police officer a “disabled member of the police force”. This supports the appellant’s contended interpretation.

*ii. Purpose*

67. There is no objects provision or express purpose stated within the Act. In *SAS Trustee Corporation v Woollard* (2014) 86 NSWLR 367 (**Woollard**), Bathurst CJ at 372 [12] noted that:

s 10 of the Act was designed to make provision for superannuation allowances to members of the Force who retired or who were discharged by reason of an infirmity of body or mind caused by the member being hurt on duty.

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<sup>26</sup> Sections 35(5) and 34(2)(a) of the *Interpretation Act*.

68. In *Woollard* at 380-381 [60], Bathurst CJ stated with respect to the applicant's contended "purpose" in that case (emphasis added):

care should be taken in considering the purpose of the statute divorced from the words of the statute itself. The present case affords an example. Mr Woollard submitted that as the purpose of the statute was to provide valuable benefits to police officers and former police officers in relation to retirement arising from "hurt on duty" situations, the section should be construed so as not to deprive a person of such benefits. However, the provision of the benefits in question is subject to the conditions in s 10B of the Act.

10 69. The appellant submits that reference to *Lembcke v SAS Trustee Corporation* (2003) 56 NSWLR 736 does not assist this Court in determining the purpose of the relevant provisions.

70. In *Lembcke*, the issue for the NSW Court of Appeal was whether the Act was required to be read in conjunction with the *Workers Compensation Act 1987* (NSW). Thus, though it was stated by Meagher JA at 738 [4] that the one question under s 10(1A) is "what is the applicant's incapacity for work outside the police force?", the context in which that question was asked must be recalled, namely, to reiterate that no reference to the *Workers Compensation Act 1987* (Cth) should be made. Additionally, the section was interpreted as requiring that question to be asked "on such an application": [4]. In that case, the relevant application was for an increase in allowance where the increased incapacity was caused by the same infirmity for which the appellant in that case was certified: 742-743 [22] (Santow J).  
20 The issue in the present case did not arise for consideration.

71. The appellant contends that the purpose of ss 10 and 10B, evident from the text and structure of the Act, and by reference to the extrinsic materials, is to provide additional superannuation entitlements to members and former members where they have met the conditions in s 10B of the Act, and where the incapacity is causally related to the member's certified and determined hurt on duty infirmity.

**(d) Trial Judge's Approach to Construction**

72. Despite the terms in which the primary judge at [63] began his consideration of this question, referred to by Sackville AJA at [44], the primary judge's approach was to read text in context, consistently with authority of this Court. Having set out the key provisions in [68],  
30 his Honour at [70] focused on the relevant definition of "disabled member of the police force", its use of the term "incapable" and the nexus to a certification under s10B(1).

73. His Honour then, at [71] described that adjective as being cognate with the noun "incapacity", which is the key operative term in subsection 10(1A). His Honour in [72] considered paragraphs (1A)(a), then (c), before turning to (b): the opening words of the chapeau of (b) mandate such an approach. His Honour summarised the argument at [74]-[75], then at [76] expressed his conclusion: the word incapacity in s 10(1A)(b)(ii) takes up the adjective "incapable" from the definition, which requires a nexus to the specified infirmity.

(e) **Decision of the Court of Appeal**

74. Sackville AJA (with whom Payne JA largely agreed), adopted a construction of s 10(1A)(b) which was variously labelled the “gateway” or “mandatory pre-condition” construction: CA [9] (Payne JA); [46], [57]-[69], [70] (Sackville AJA).
75. Their Honours found that the gateway or pre-condition was the certification and determination of some infirmity under s 10B, and that once that condition was met, the respondent was entitled to receive an increase in entitlements under s 10(1A)(b) to reflect an incapacity of 90% irrespective of whether that incapacity arose from a certified hurt on duty injury.
- 10 76. Schmidt J dissented, agreeing with the primary judge that the relevant infirmities for which an increased entitlement can be paid are only those which are subject of the s 10B certification and determination: CA [115]-[116].
77. While Sackville AJA set out the relevant provisions of the Act (CA [29]-[41]), his Honour did not consider the scheme of the Act as a whole.<sup>27</sup> Sackville AJA commenced his approach to construction by stating that “the meaning of the text *may* require consideration of the context” (emphasis added) (CA [53]), in contradistinction to the proper approach set out above, namely, that context *must* be considered at the outset.
78. His Honour then commenced with a literal interpretation (at CA [57]), focusing solely on the text of s 10(1A)(b) and the structure of s 10(1A), divorced from the immediate, and textually incorporated, context of s 10B. This close focus upon the text of s 10(1A) alone is apparent through to CA [69].
- 20
79. Although his Honour made passing reference to the certification and determination requirements of s 10B at CA [61]-[63], and in his conclusion at [69], his Honour did not analyse this key provision either by comparing it to s 8 in order to properly place it and s 10 within the context of the two separate streams of entitlement, nor did his Honour address the need to read the definition of ‘disabled member of the police force’ into the chapeau of subsection (1A) before construing the provision: cf CA [62].
80. Only after his Honour had reached a concluded view as to the construction of s 10(1A)(b) (at CA [67]-[69]), did he consider whether the construction was harmonious with the structure of the Act: CA [70]; [72] (“If s 10(1A)(b) of the Superannuation Act is given its ordinary meaning, there is no inconsistency or lack of harmony with s 10B(1).”); CA [5] per Payne JA.
- 30

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<sup>27</sup> Cf Bathurst CJ’s approach in *Woollard* at [14].

81. It was thus only at that late stage that his Honour even considered s 10B: CA [71]-[72]. In so doing, his Honour stated that to construe s 10B as imposing an additional requirement that the discharged member be incapacitated for non-police work by reason of the certified hurt on duty infirmity, "is to read the provision as though it contains the words 'and the specified infirmity has caused the member's incapacity for work outside the police work'": CA [72]. That is not so: the nexus required is clear once the definition is read in, and the provision construed in context.
- 10 82. Though his Honour referred to the primary scheme of entitlements created by ss 7 and 8 at CA [73]-[74], he did not acknowledge the important textual differences embodied in the general reference to "infirmity" in ss 7 and 8 compared with the reference to specific infirmities in ss 10 and 10B. This led to his Honour's conclusion as to the purpose of the provisions, which attributes a purpose to Parliament beyond that which the text of the provisions would support: CA [74], [77].
- 20 83. Importantly, it was also only then that his Honour considered s 10(1A)(c): CA [80]-[87]. At [82], his Honour stated that "the opening words of s 10(1A)(b) make it clear that there is no overlap between s 10(1A)(b) and (c)", but failed to consider the significance of the fact that (b) only has application "except where paragraph (c) applies". His Honour was not entitled to "assume, without deciding" (CA [81]) the construction of paragraph (c), as this is an important step in the construction and ambit of operation of paragraph (b), as discussed above.
84. In any event, his Honour proceeded on the basis that the appellant's suggested construction of s 10(1)(c) that a nexus was required between incapacity and the "hurt on duty" infirmity, was "arguably correct": CA [81]. However, his Honour ultimately discounted the significance of that in favour of the "plain" meaning: CA [87].
85. Payne JA differed from Sackville AJA in this respect in finding that s 10(1A)(c) (along with s 10(1A)(b)) did not even require a causal link between the total incapacity for work and the circumstances in which the member was hurt on duty because the member was exposed to particular risks: CA [7].
- 30 86. Sackville AJA deferred reference to the extrinsic materials until he had reached a view of the meaning of the key provisions unaided by context, and then discounted the significance of the Second Reading Speech by adopting a very narrow reading of the key passage, at CA [92].
87. Finally, while his Honour referred at CA [36] to s 35(2)(a) of the *Interpretation Act* and that headings are not to be taken part of the Act, and while making passing references to the headings (CA [32] and [36]), his Honour erred in not considering headings in the interpretation of the Act. Consideration of the heading of s 10 when contrasted to the heading of s 7 assists in construing the statutory scheme and forms part of the context in which s 10(1A)(b) should be construed: *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 621.

88. It is plain for the reasons given above that when construed in context, references to “incapacity”, “incapable” and “incapacitated” in ss 10 and 10B are references to one and the same thing. By considering context at the outset including that the definition of ‘disabled member of the police force’ effects an express incorporation of s 10B within s 10, and the fact that s 10(1A)(b) applies only if s 10(1A)(c) does not, the difficulty in reading “incapable” in s 10B and the definition in s 10(1) (and therefore chapeau of s 10(1A)), and “incapacity” in s 10(1A)(b)(ii) within the same subsection, as dealing with different concepts,<sup>28</sup> as well as reading “incapacitated” in s 10(1A)(c) as being a different concept to “incapacity” in s 10(1A)(b)(ii), is readily apparent.

10 89. The certification by the respondent and subsequent determination by the Commissioner is not merely a “gateway” or “precondition” to the operation of s 10(1A): cf CA [9], [46], [57]-[69], [70]. The infirmities so certified and determined control the basis upon which any entitlement is payable.

90. The majority of the Court of Appeal should have found as Schmidt J did: namely, that the respondent is only entitled to a benefit under s 10(1A)(b)(ii) if the infirmity or infirmities which caused the incapacity are those infirmities that were specified in the certificate of the respondent of 28 August 2003, and which were determined by the Commissioner on 4 September 2003 to have been caused by the respondent having been hurt on duty: see eg Schmidt J at CA [127]-[128], [134].

## 20 **Part VII: LEGISLATIVE PROVISIONS**

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91. A copy of the relevant legislative provisions as at 11 April 2016, being the date the District’s Court decision was made under s 21 of the Act,<sup>29</sup> and thus the operative date for the purposes of this appeal,<sup>30</sup> is annexed.

92. The relevant provisions of all legislation as annexed are still in force, in that form, as at the date of these submissions.

## **Part VIII: ORDERS SOUGHT**

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93. Appeal allowed.

94. Set aside orders 1 and 2 of the Court of Appeal of the Supreme Court of New South Wales made on 4 May 2017 and in their place order that the appeal to that Court be dismissed.

30 95. The appellant pay the respondent’s costs of the appeal.

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<sup>28</sup> Payne JA at [4].

<sup>29</sup> See s 21(6) of the Act (“Where the District Court makes a decision referred to in subsection (4)(b), that decision shall, for the purposes of this Act, be deemed to be made by STC or the Commissioner of Police, as the case may be, and shall be carried into effect.”); *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [96]-[97].

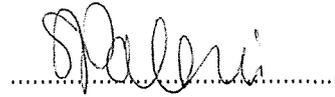
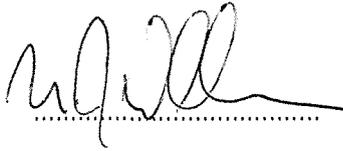
<sup>30</sup> In circumstances where the appeal to the Court of Appeal was pursuant to s 142N of the *District Court Act 1973* (NSW).

Part IX: ORAL ARGUMENT

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96. The appellant estimates that 1.5 hours will be required for the presentation of the appellant's oral argument including reply.

Dated: 24 November 2017



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# ANNEXURE

Police Regulation (Superannuation) Act 1906 No 28 [NSW]

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## Police Regulation (Superannuation) Act 1906 No 28



New South Wales

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An Act to amend the *Police Regulation Act 1899*.

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### Part 1 Preliminary

#### 1 Name of Act, commencement and definitions

(1) This Act may be cited as the *Police Regulation (Superannuation) Act 1906*.

(1A) This Act shall commence on 1 February 1907.

(2) In this Act, except to the extent that the context or subject-matter otherwise indicates or requires:

*approved employment benefit* means a benefit provided to a member of the NSW Police Force at the cost of the member's employer (being a benefit of a private nature) that is approved by the Minister, with the concurrence of the Treasurer, for the purposes of this section in relation to the member or a class of employees of which the member is a member.

*attributed salary of office* of a contributor at any time means:

- (a) if the contributor is a full-time member of the police force at the time, the salary of office of the contributor at that time, or
- (b) if the contributor is a part-time member of the police force at the time, the salary of office that would be payable to the contributor at that time if employed as a full-time member of the police force.

*Board* means the State Authorities Superannuation Board referred to in section 4 of the *Superannuation Administration Act 1991*.

*Commonwealth taxation law* means a law of the Commonwealth providing for the levying and collection of a tax.

*contributor* means contributor to the Fund.

*equivalent full-time service* means the cumulative total of all periods worked by a contributor as a member of the police force (as a full-time member of the police force or a part-time member of the police force, or both) expressed as the nearest equivalent period of full-time service.

*equivalent service ratio* is defined in section 6.

*executive officer* means a member of the NSW Police Force who is:

- (a) a police executive officer, or
- (b) a member of the police force who is an office holder nominated for the purposes of section 11A of the *Statutory and Other Offices Remuneration Act 1975*, or

(c) a Public Service senior executive within the meaning of the *Government Sector Employment Act 2013*.

(d) (Repealed)

*family law superannuation legislation* has the same meaning as it has in Part 4A.

*family law superannuation payment* has the same meaning as it has in Part 4A.

*First State Superannuation Fund* has the same meaning as *Fund* has in the *First State Superannuation Act 1992*.

*full-time member of the police force* means a member of the police force whose salary ratio is equal to 1.

*Fund* means the Police Superannuation Fund established by this Act.

*hurt on duty*, in relation to a member of the police force, means injured in such circumstances as would, if the member were a worker within the meaning of the *Workers Compensation Act 1987*, entitle the member to compensation under that Act.

*member of the police force* means a police officer within the meaning of the *Police Act 1990* or a member of the NSW Police Force who was a contributor immediately before being transferred to an administrative office under section 67 of that Act.

*part-time member of the police force* means a member of the police force whose salary ratio is less than 1 but at least 0.1.

*penalty*, in relation to a Commonwealth taxation law, includes (but is not limited to):

- (a) a penalty rate of taxation under that law, and
- (b) the loss of a concessional rate of taxation under that law.

*police executive officer* means an executive officer within the meaning of Part 5 of the *Police Act 1990*.

*police force* means that part of the NSW Police Force which consists of members of the police force within the meaning of this Act.

*Police Medical Board* means the Police Medical Board established under section 15A.

*relevant Commonwealth superannuation standard* means a standard that would be applicable under the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth if the Fund was a regulated superannuation fund under that Act.

*remuneration* includes allowances and other benefits.

*salary of office*, in relation to a member of the NSW Police Force other than an executive officer, means the sum of:

- (a) the remuneration ordinarily received by the member as the ordinary pay of the member's rank and position, not including:
  - (i) an amount paid for overtime or as a bonus, or
  - (ii) a relieving allowance, or
  - (iii) an allowance paid instead of the supply of a uniform, or
  - (iv) an expense allowance or an allowance for travelling, subsistence or other similar expenses, or

- (v) a climatic, disability or living allowance paid when stationed or residing at a particular place, or
- (vi) an allowance for equipment, or
- (vii) remuneration of a kind prescribed by the regulations as exempt for the purposes of this paragraph, or
- (viii) in respect of any period during which the member takes extended leave (or leave in the nature of extended leave) otherwise than on full pay, such part of the remuneration received by the member as exceeds the salary of office (within the meaning of this definition) that he or she would have received had he or she taken leave on full pay,

unless the regulations otherwise provide, and

- (a) if salary sacrifice contributions are made in respect of the member, the amounts payable for those contributions under section 5AD (3) (a) and (b), and
- (b) if approved employment benefits are provided to the member, the cost of providing the approved employment benefits, as determined by the Minister, with the concurrence of the Treasurer, expressed as an annual rate.

*salary of office*, in relation to an executive officer, has the meaning set out in section 1AA.

*salary ratio* of a contributor during a period means the number ascertained by dividing the salary of office of the contributor at the commencement of the period by the attributed salary of office of the contributor at that commencement.

*salary sacrifice contribution*—see section 5AD (2).

*spouse* of a member or former member of the police force who has died means the widow or widower, as the case may be, of the member or former member.

*STC* means the SAS Trustee Corporation continued under the *Superannuation Administration Act 1996*.

*superannuation contributions surcharge* means the superannuation contributions surcharge imposed under the *Superannuation Contributions Tax Imposition Act 1997* of the Commonwealth.

*superannuation guarantee shortfall* has the same meaning as in the *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth.

(3) Where:

- (a) the salary of office of a member of the police force is reduced by reason that the member ceases to be paid an allowance (otherwise than as a consequence of disciplinary proceedings),
- (b) the salary of office of the member at the date of the member's death, retirement, resignation or discharge is less than the salary of office of the member immediately before it was so reduced, and
- (c) the member died, retired, resigned or was discharged on or after the day appointed and notified under section 2 (2) of the *Police Regulation (Superannuation) Amendment Act 1984*,

the salary of office of the member at the date of the member's death, retirement, resignation or discharge shall, for the purposes of this Act, be deemed to be the salary of office of the member immediately before it was so reduced.

(4) In this Act, a reference to:

- (a) a function includes a reference to a power, authority and duty, and
  - (b) the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.
- (5) In this Act, a reference to the salary of office of a member of the police force, other than an executive officer, who is a part-time member of the police force (including a member who fills a full-time position but is on part-time leave without pay) is a reference to the actual salary of office received by the officer while working as a part-time member of the police force.
- (6) In this Act, a reference to part-time service includes any period during which a member of the police force is employed as a part-time employee or takes part-time leave without pay and is required by this Act to contribute to the Fund.
- (7) Notes included in this Act do not form part of this Act.

**1AA Salary of office: executive officers**

**(1) Definition of salary**

For the purposes of this Act, the *salary of office* of an executive officer is the salary as last nominated or changed in accordance with this section.

**(2) Nomination of salary on initial and subsequent appointments**

An amount of salary for the purposes of this Act must be nominated to the Commissioner by an executive officer, on, or as soon as practicable after, being appointed as an executive officer. An amount may also be nominated to the Commissioner by the officer on, or as soon as practicable after, being reappointed, or appointed to another position, as an executive officer.

**(3) Amount of salary**

The amount nominated is to be not less than the monetary remuneration payable to the executive officer at the date of nomination and not more than the total value of the remuneration package paid to the officer (less the cost of providing employer's contributions to superannuation, other than salary sacrifice contributions, under this Act and the *State Authorities Non-contributory Superannuation Act 1987* and any performance-related incentive payment), expressed as an annual rate.

**(4) Failure to nominate salary**

If an executive officer fails to nominate an amount of salary within 28 days of first being appointed as an executive officer or within such further period as STC may allow, the officer is taken to have nominated an amount of salary that is equal to the monetary remuneration payable to the officer at the end of the applicable period.

**(5) Reduction in nominated salary**

An executive officer may, from time to time, by notice to the Commissioner elect to reduce the amount of salary nominated under this section, but not so that the amount is less than the monetary remuneration payable to the officer at the date of the election.

**(6) Increase in nominated salary**

An executive officer may, from time to time, by notice to the Commissioner elect to increase the amount of salary nominated under this section, but not so as to increase the amount nominated by a percentage of that amount that is more than the percentage by which the remuneration package of the officer has increased since the amount of salary was last nominated or changed.

**(6A) Change of salary on change of work**

The amount of salary nominated for the purposes of this Act is, on an executive officer becoming a full-time member of the police force after being a part-time member of the police force or becoming a part-time member of the police force after being a full-time member of the police force, changed so that it is an amount equal to the same percentage of the officer's remuneration package after the change in work as the

- (d) any other money received by STC pursuant to this Act.
- (3) STC must pay out of the Fund:
  - (a) the benefits provided by this Act,
  - (b) such amounts as may be necessary to satisfy any liability of the Fund with respect to tax payable under a Commonwealth taxation law or an amount of superannuation contributions surcharge,
  - (c) the administration costs relating to the Fund referred to in section 85 of the *Superannuation Administration Act 1996*, and
  - (c1) any administration costs and other amounts payable by STC and arising under the family law superannuation legislation or Part 4A, and
  - (d) any other money properly payable from the Fund.

#### 4 Fund deficiencies charged against Consolidated Revenue

If at any time the amount at credit of the Fund is insufficient to meet the superannuation allowances and other amounts (other than a conversion benefit, or interest, payable under Part 3B) payable under this Act, the amount of the deficiency is a charge against the Consolidated Revenue Fund.

#### 5 Contributions to Fund

- (1) Subject to subsection (2), there shall be deducted from the salary of office of each qualified person and paid to the Fund an amount equal to 6 per cent of that salary of office.
- (2) Subsection (1), in its application to a qualified person who:
  - (a) immediately before the day appointed and notified under section 2 (2) of the *Police Regulation (Superannuation) Amendment Act 1981* was the Commissioner, the Deputy Commissioner, the Senior Assistant Commissioner or an Assistant Commissioner, and
  - (b) has on that day attained, or thereafter attains, the age of 60 years,shall be construed as if the reference in subsection (1) to 6 per cent were a reference to 2 per cent.
- (3) A member of the NSW Police Force who is a contributor, or an employee of the Police Association of New South Wales who is a contributor, is a qualified person for the purposes of this section if the member or employee is under 70 years of age.

#### 5AA Source of administration costs payments

The administration costs payable in respect of the superannuation scheme established under this Act are to be paid from the Fund.

#### 5A Leave without pay

- (1) In this section:
  - initial period*, in relation to a period of leave, means such period commencing with the first day of that leave as is prescribed as the initial period for the purposes of this section.
  - leave without pay* means a period of leave requested by a member of the police force during which the member is not entitled to payment of the member's salary of office, being a period of leave which commences on or after the day appointed and notified under section 2 (2) of the *Police Regulation (Superannuation) Amendment Act 1984*.

- (4) A matter or thing done or omitted to be done by FTC, the FTC Board, a member of the Board or any person acting under the direction of FTC or the Board, does not, if the matter or thing was done or omitted in good faith:
- (a) in connection with obtaining or making a conversion election, or
  - (b) in connection with the provision of information in relation to this Part, or
  - (c) for the purpose of executing this Part,
- subject FTC, a member of the Board or a person so acting, to any action, liability, claim or demand.
- (5) This section has effect despite the *Superannuation Administration Act 1996* or any other law.

## Part 4 Benefits

### Division 1 Superannuation allowances and gratuities

#### 6 Equivalent service ratio

In this Part and section 5B:

*actual contributory service* (or *ACS*) of a contributor or member of the police force is the sum of the figures obtained by multiplying each month during which the person has been a contributor whether as a full-time or part-time member of the police force (up to a maximum of 360 months of equivalent full-time service and not including any month that is not taken to be a period of service because of section 5A (4)) by the salary ratio of the person for that month.

*equivalent service ratio* (or *ESR*) of a contributor or member of the police force means:

$$\frac{ACS}{PCS}$$

*potential contributory service* (or *PCS*) of a contributor or member of the police force means the total number of months during which the person has been a contributor whether as a full-time or part-time member of the police force (up to a maximum of 360 months of equivalent full-time service and not including any month that is not taken to be a period of service because of section 5A (4)).

#### 7 Superannuation allowance except where member hurt on duty

- (1) The annual superannuation allowance for a member of the police force who has served 20 years or more of equivalent full-time service and retires on or after attaining the age of 60 years or, being under that age, is discharged after being certified under section 8 (1) to be incapable, from infirmity of body or mind, of personally exercising the functions of a police officer referred to in section 14 (1) of the *Police Act 1990*, is an amount calculated in accordance with the following formula:

$$P = Y \times ESR$$

where:

*P* represents the amount of the annual superannuation allowance payable.

*Y* represents a percentage of the member's attributed salary of office at the date of the member's retirement or discharge equal to the sum of:

- (a) the percentage specified in the Second Column of the Table to this subsection opposite the total number of years of both full-time and part-time service specified in the First Column of that Table that has been completed by the member, and

- (b) in the case of a person who has completed less than 30 years of equivalent full-time service, one-twelfth of 2.425 per cent for each month of full-time or part-time service that has been completed by the member after the last completed year of service referred to in paragraph (a),

*ESR* represents the equivalent service ratio of the member as at the date of the member's retirement or discharge.

First Column	Second Column
Completed years of both full-time and part-time service of member	Amount per centum
20	48.500
21	50.925
22	53.350
23	55.775
24	58.200
25	60.625
26	63.050
27	65.475
28	67.900
29	70.325
30 or more	72.750

- (2) An annual superannuation allowance under subsection (1) shall not be payable to a member of the police force to whom an annual superannuation allowance is payable under section 10.
- (3) If STC has made a determination under section 14AA in relation to an annual superannuation allowance payable under subsection (1), the amount of the allowance is reduced by the amount specified in STC's determination.

**7AA Superannuation allowance on early retirement**

- (1) (Repealed)
- (2) Subject to subsection (2B), the annual superannuation allowance for a member of the police force who retires on or after reaching the age of 55 years and before reaching the age of 60 years is the amount calculated in accordance with the following formula:

$$P = \frac{0.02425}{12} \times S \times V \times \left[ 1 - \frac{0.04}{12} \times (720 - A) \right] \times ESR$$

where:

*P* represents the annual superannuation allowance payable.

*S* represents the member's attributed salary of office at the date of retirement.

*V* represents the total number of months of both full-time and part-time service that has been completed by the member (subject to a maximum of 360 months of equivalent full-time service).

*A* represents the age of the member at the date of retirement (expressed in months).

- (c) a retired member of the police force who is not married, where:
  - (i) that retired member is in receipt of a superannuation allowance granted pursuant to this Act that is less than twenty dollars per fortnight, and
  - (ii) paragraph (a) (iii) applies, and
- (d) a widow of a retired member of the police force where:
  - (i) that widow is in receipt of or is entitled to receive a superannuation allowance granted pursuant to section 11A that is less than twenty dollars per fortnight, and
  - (ii) paragraph (a) (iii) applies.
- (4) The superannuation allowance payable or granted under this Act to a person to whom this section applies is, subject to subsection (5), hereby increased:
  - (a) in the case of a married retired member referred to in subsection (3) (a), to the prescribed superannuation allowance for that person,
  - (b) in the case of a married retired member referred to in subsection (3) (b), to an amount whereby the total produced by adding:
    - (i) the increased superannuation allowance payable to that retired member under this paragraph, and
    - (ii) any increased superannuation allowance payable to the spouse or de facto partner of that retired member under this paragraph,is the prescribed superannuation allowance for those spouses or de facto partners, and
  - (c) in the case of a retired member or widow of a retired member referred to in subsection (3) (c) or (d) to the prescribed superannuation allowance for that retired member or widow of a retired member, as the case may be.
- (5) Payment of an increase under subsection (4) shall be made:
  - (a) in the case of a retired member or widow of a retired member who, at the commencement of the *Police Regulation (Superannuation) Amendment Act 1970*, is eligible for an increase, as from the date the superannuation allowance becomes next payable after such commencement,
  - (b) in the case of a widow of a retired member who becomes eligible for an increase after that commencement, on and from the day on which that widow becomes so eligible.
- (6) Nothing in this section shall be construed as authorising or requiring any reduction in a superannuation allowance that has been increased under this section.

#### **8 Determination of members medically unfit**

- (1) A superannuation allowance or gratuity must not be granted or paid under section 7 or 14 to a member of the police force who:
  - (a) is discharged after the commencement of the *Police Regulation (Superannuation and Appeals) Amendment Act 1973*, and
  - (b) at the time of the member's discharge is under the age of 60 years,unless STC (having regard to medical advice on the condition and fitness for employment of the member) has certified the member to be incapable, from infirmity of body or mind, of personally exercising the functions of a police officer referred to in section 14 (1) of the *Police Act 1990*.

**Note.** Section 14 (1) of the *Police Act 1990* provides that a police officer has the functions conferred or imposed on a constable by or under any other law (including the common law) of the State.

- (2) For the purposes of determining a member's incapacity:
- (a) STC is not to have regard to the member's actual rank or position or functions (other than the functions referred to in subsection (1)), and
  - (b) the capacity to exercise a function by delegation is not taken to be a capacity to personally exercise the function.
- (2A) (Repealed)
- (3) In this section:
- medical advice* means the advice of:
- (a) 2 members of the Police Medical Board, or
  - (b) any one or more medical practitioners nominated by the STC.

**8A Disengagement benefit for members aged between 45–55**

- (1) The Commissioner of Police may, if the Commissioner considers that it is in the interests of the police force to do so, offer a disengagement benefit under this section to any class of members of the police force (or any particular members of the police force).
- (2) A member of the police force is not eligible for a disengagement benefit under this section unless the member:
- (a) is of or over 45 years of age but less than 55 years of age, and
  - (b) has served as a member of the police force for at least 20 years of equivalent full-time service.
- (3) A disengagement benefit under this section is payable as follows:
- (a) the portion of the benefit that is equal to the amount of the employer-financed benefit that would be payable under section 15 is payable from the Fund,
  - (b) the portion of the benefit that is equal to the amount that would be payable if the member had resigned and was paid a benefit under section 17 is payable from the Fund,
  - (c) the remainder of the benefit is payable by the Commissioner of Police and is not payable from the Fund.
- (4) A member of the police force who accepts an offer of a disengagement benefit under this section shall be retired from the police force by the Commissioner of Police in accordance with the terms of the offer.
- (5) The disengagement benefit under this section is a gratuity calculated in accordance with the following formula:

$$L = \left[ E \times \frac{S}{S+P} \times 0.97^{(55-A)} \right] \times ESR$$

where:

*L* represents the gratuity payable.

*E* represents the lump sum that would have been payable if the member had continued as a member of the police force until the age of 55 years at the same attributed salary of office, and had always worked as a full-time member of the police force and had wholly commuted the superannuation allowance otherwise payable to the member.

**10 Superannuation allowance where member hurt on duty**

(1) In this section:

*attributed salary of office* means:

- (a) in relation to a member of the police force who is discharged—the member's attributed salary of office at the date of the member's discharge, or
- (b) in relation to a former member of the police force who resigned or retired—the member's attributed salary of office at the date of the member's resignation or retirement.

*disabled member of the police force* means:

- (a) a member of the police force who is discharged after being certified, pursuant to section 10B (1), to be incapable, from a specified infirmity of body or mind, of personally exercising the functions of a police officer referred to in section 14 (1) of the *Police Act 1990*, or
- (b) a former member of the police force who resigned or retired and who, according to a certificate given pursuant to section 10B (2) at any time after the member's resignation or retirement, was incapable, from an infirmity of body or mind, of personally exercising the functions of a police officer referred to in section 14 (1) of the *Police Act 1990* at the time of the member's resignation or retirement,

that infirmity being determined, pursuant to section 10B (3) or on appeal, to have been caused by the member being hurt on duty or the former member having been hurt on duty when he or she was a member of the police force, as the case may be.

*retired* includes discharged as referred to in section 7 or 14.

(1A) Subject to this section, the annual superannuation allowance for a disabled member of the police force is:

- (a) an amount that is equal to 72.75 per cent of the member's attributed salary of office,
- (b) except where paragraph (c) applies, an additional amount that is:
  - (i) not more than 12.25 per cent of the member's attributed salary of office, and
  - (ii) commensurate, in the opinion of STC, with the member's incapacity for work outside the police force, and
- (c) if the disabled member is totally incapacitated for work outside the police force and, in the opinion of STC, the member was hurt on duty because the member was required to be exposed to risks to which members of the general workforce would normally not be required to be exposed in the course of their employment, an additional amount that is:
  - (i) not less than 12.25 per cent and not more than 27.25 per cent of the member's attributed salary of office, and
  - (ii) commensurate, in the opinion of STC, with the risks to which the member was so required to be exposed,

multiplied by the equivalent service ratio of the member as at the date of the member's discharge, resignation or retirement.

(1AA) If STC has made a determination under section 14AA in relation to an annual superannuation allowance payable under this section, the amount of the allowance is reduced by the amount specified in STC's determination.

- (1B) An annual superannuation allowance may be granted under this section to a disabled member of the police force whatever the member's length of service.
- (1BA) A superannuation allowance referred to in subsection (1A) or an additional amount of a superannuation allowance referred to in subsection (1D) is not payable to a disabled member of the police force unless an application for payment of the allowance or additional amount concerned is made:
- (a) before the member reaches the age of 60 years, or
  - (b) not later than 5 years after the member resigns or retires,
- whichever is the later.
- (1C) Where a former member of the police force who resigned or retired is granted an annual superannuation allowance under this section, the allowance shall, at the time it first becomes payable, be increased or reduced, as the case may require, by the total amount (if any) that it would have been increased or reduced under Division 2 or any other provision of this Act if it had been granted when the former member resigned or retired.
- (1D) STC may:
- (a) make a determination at any time of an additional amount of a superannuation allowance under this section, and
  - (b) vary any such determination at any time,
- and may direct that the determination or variation take effect from such date as STC considers appropriate.
- (2) An annual superannuation allowance under this section shall not be payable to a former member of the police force who:
- (a) wholly commuted under Division 3 a superannuation allowance that previously became payable to the former member under this Act, or
  - (b) has been paid a disengagement benefit under section 8A.
- (3) If a superannuation allowance payable to a former member of the police force was partially commuted under Division 3, the allowance payable under subsection (1A) in respect of the member is to be reduced by the proportion that the commuted part of the superannuation allowance bears to the whole of the superannuation allowance.
- (4)–(7) (Repealed)

#### **10A Injury management program**

- (1) STC is not to commence to pay a benefit otherwise payable under section 10 in respect of a member of the police force if the Commissioner of Police decides that a reasonable direction given to the member in respect of the member's participation in an injury management program has, as at the time of the decision, not been complied with by the member.
- (2) If the Commissioner makes such a decision, the Commissioner must give written notice of the decision to STC and to the member.
- (3) The Commissioner must not so decide unless:

- (a) the injury management program was approved by the Commissioner as being no less beneficial to participants in the program than any comparable injury management program under the *Workplace Injury Management and Workers Compensation Act 1998* applicable to members of the police force, and
- (b) the member failed to comply with a reasonable direction given to the member in respect of the member's participation in the program, and
- (c) the member was given a reasonable opportunity to comply, and
- (d) the member was warned in writing that failure to comply might result in the member not receiving a benefit under this Act.

**10B Medical examination of disabled member and determination of whether hurt on duty**

- (1) An annual superannuation allowance or gratuity must not be granted under section 10 to a member of the police force who is discharged unless STC (having regard to medical advice on the condition and fitness for employment of the member) has certified the member to be incapable, from a specified infirmity of body or mind, of personally exercising the functions of a police officer referred to in section 14 (1) of the *Police Act 1990*.
- (2) An annual superannuation allowance or gratuity must not be granted under section 10 to a former member of the police force who resigned or retired unless:
  - (a) the former member notified the Commissioner of Police before the member's resignation or retirement and within 6 months of receiving the injury which has caused the member's infirmity of body or mind, of that injury, and
  - (b) if the regulations so require, the notification was in the prescribed form, and
  - (c) STC (having regard to medical advice on the condition and fitness for employment of the member) has certified that the former member was incapable, from that infirmity of body or mind, of personally exercising the functions of a police officer referred to in section 14 (1) of the *Police Act 1990* at the time of the member's resignation or retirement.
- (2A) For the purposes of determining a member's or former member's incapacity under this section:
  - (a) STC is not to have regard to the member's or former member's actual rank or position or any functions (other than the functions referred to in subsection (2) (c)) of the member or former member at the time to which the certification relates, and
  - (b) the capacity to exercise a function by delegation is not taken to be a capacity to personally exercise the function.
- (2B), (2BA) (Repealed)
- (2C) In this section:
  - medical advice* means the advice of:
    - (a) 2 members of the Police Medical Board, or
    - (b) any one or more medical practitioners nominated by the STC.
- (3) Where a member or former member of the police force is duly certified under subsection (1) or (2), the Commissioner of Police shall:
  - (a) decide whether or not the infirmity to which the certificate relates was caused by the member being hurt on duty or the former member having been hurt on duty when he or she was a member of the police

force, as the case may be, and the date or dates on which the member or former member was hurt on duty, and

- (b) give the member or former member written notification of the decision.

**10C Redemption of superannuation allowance granted to disabled member**

- (1) In this section, *prescribed part*, in relation to an annual superannuation allowance granted under section 10 to a disabled member of the police force, means an amount, calculated on an annual basis, that, in the opinion of STC, would have been payable to the member:

- (a) in the case of a member of the police force who is discharged—at the date of the member's discharge, or  
(b) in the case of a former member of the police force who resigned or retired—at the date of the member's resignation or retirement,

by way of weekly payments of compensation under Division 2 of Part 3 of the *Workers Compensation Act 1987* if the disabled worker were a person entitled to compensation under that Division in respect of a period of total incapacity for work occurring after the first 26 weeks of incapacity.

- (1A) This section applies in the following cases to a liability of the Fund in respect of the prescribed part of any annual superannuation allowance granted under section 10 to a disabled member of the police force:

- (a) in the case of an injury received before the commencement of the *Police Regulation (Superannuation) (Workers Compensation) Amendment Act 1987*,  
(b) in the case of a disabled member of the police force who has reached 55 years of age (but only in respect of 40 per cent of the prescribed part of the annual superannuation allowance payable for a period of 5 years),  
(c) in any case prescribed by the regulations and to the extent so prescribed,  
(d) in the case of a particular disabled member of the police force approved by STC in special circumstances and to the extent so approved.

- (2) A liability of the Fund to which this section applies may, with the consent of the disabled member, be commuted (either in whole or in part) to a lump sum payment, determined by STC, having regard to:

- (a) the nature of the injury received by the disabled member,  
(b) the age of the disabled member, and  
(c) the diminished ability of the disabled member to compete in an open labour market.

- (3) This section does not apply to the whole or part of a superannuation allowance that has been commuted under Division 3.

**11 Grant of superannuation allowance to the surviving spouse or de facto partner of a former member of the police force who dies after the commencement of Schedule 1 (7) to the Police Regulation (Superannuation) Amendment Act 1988**

- (1) Subject to this section, if:

- (a) a former member of the police force to whom a superannuation allowance has been granted dies on or after the commencement of Schedule 1 (7) to the *Police Regulation (Superannuation) Amendment Act 1988*, and

- (a) it shall be a valid provision to the extent to which it is not in excess of that power, and
  - (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.
- (3) This section applies to an Act or instrument in addition to, and without limiting the effect of, any provision of the Act or instrument.

**32 Instruments to be construed so as not to exceed the powers conferred by the Acts under which they are made**

- (1) An instrument shall be construed as operating to the full extent of, but so as not to exceed, the power conferred by the Act under which it is made.
- (2) If any provision of an instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the power conferred by the Act under which it is made:
- (a) it shall be a valid provision to the extent to which it is not in excess of that power, and
  - (b) the remainder of the instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.
- (3) This section applies to an instrument in addition to, and without limiting the effect of, any provision of the instrument or of the Act under which it is made.

**33 Regard to be had to purposes or objects of Acts and statutory rules**

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

**34 Use of extrinsic material in the interpretation of Acts and statutory rules**

- (1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
  - (b) to determine the meaning of the provision:
    - (i) if the provision is ambiguous or obscure, or
    - (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.
- (2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:
- (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer,

- (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the provision was enacted or made,
  - (c) any relevant report of a committee of Parliament or of either House of Parliament before the provision was enacted or made,
  - (d) any treaty or other international agreement that is referred to in the Act,
  - (e) any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made,
  - (f) the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House,
  - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section, and
  - (h) any relevant material in the Minutes of Proceedings or the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament.
- (3) In determining whether consideration should be given to any material, or in considering the weight to be given to any material, regard shall be had, in addition to any other relevant matters, to:
- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), and
  - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

#### 34A Declaration of validity of certain laws

Each provision of an Act or statutory rule enacted or made, or purporting to have been enacted or made, before the commencement of the Australia Acts:

- (a) has the same effect as it would have had, and
- (b) is as valid as it would have been,

if the Australia Acts had been in operation at the time of its enactment or making, or purported enactment or making.

#### 35 Headings etc

- (1) Headings to provisions of an Act or instrument, being headings to:
- (a) Chapters, Parts, Divisions or Subdivisions into which the Act or instrument is divided, or
  - (b) Schedules to the Act or instrument,
- shall be taken to be part of the Act or instrument.
- (2) Except as provided by subsections (3) and (4):
- (a) a heading to a provision of an Act or instrument (not being a heading referred to in subsection (1)),

- (b) matter within a provision of an Act or instrument (being matter in parentheses that merely sets out a heading to or describes the effect of some other provision of the Act or instrument or of some other Act or instrument), or
  - (c) a marginal note, footnote or endnote in an Act or instrument,
- shall be taken not to be part of the Act or instrument.
- (3) A heading to a provision of an Act or instrument (not being a heading referred to in subsection (1)) shall be taken to be part of the Act or instrument if, immediately before 1 February 1981 (being the date on which section 3 of the *Interpretation (Amendment) Act 1980* commenced), it was part of the Act or instrument.
  - (4) A heading to a provision of an Act or instrument (not being a heading referred to in subsection (1)), or a marginal note, footnote or endnote in an Act or instrument, shall be taken to be part of the Act or instrument if:
    - (a) it is referred to expressly, otherwise than by means of matter within some other provision of the Act or instrument (being matter in parentheses that merely sets out a heading to or describes the effect of the firstmentioned provision) or by means of a symbol, in some other part of the Act or instrument, or
    - (b) not being so referred to, it is a heading, marginal note, footnote or endnote to a table or form in the Act or instrument.
  - (4A) The number of a section, subsection, clause or subclause of an Act or instrument is taken to be part of the Act or instrument even though it appears in a heading to the section, subsection, clause or subclause.
  - (5) This section does not limit the application of section 34 in relation to the use of any heading, marginal note, footnote or endnote in the interpretation of the provision to which the heading, marginal note, footnote or endnote relates.

### 36 Reckoning of time

- (1) If in any Act or instrument a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall be reckoned exclusive of that day or of the day of that act or event.
- (2) If the last day of a period of time prescribed or allowed by an Act or instrument for the doing of any thing falls:
  - (a) on a Saturday or Sunday, or
  - (b) on a day that is a public holiday or bank holiday in the place in which the thing is to be or may be done,the thing may be done on the first day following that is not a Saturday or Sunday, or a public holiday or bank holiday in that place, as the case may be.
- (3) If in any Act or instrument a period of time is prescribed or allowed for the doing of any thing and a power is conferred on any person or body to extend the period of time:
  - (a) that power may be exercised, and
  - (b) if the exercise of that power depends on the making of an application for an extension of the period of time—such an application may be made,after the period of time has expired.