

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No. S260 of 2017

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 OUTLINE OF ORAL ARGUMENT

#### Part I: CERTIFICATION

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1. SAS Trustee Corporation (the **appellant**) certifies that this outline is in a form suitable for publication on the internet.

#### Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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*Two separate streams in the Act*

2. **Scheme of the Act:** the *Police Regulation (Superannuation) Act 1906* (NSW) (the **Act**) in s 3 creates the fund, and imposes an obligation on the appellant to pay the benefits provided by the Act; in s 5 provides for deduction of 6% from salary of members of the Police Force, to be paid into the fund; and in s 4 provides for deficiencies in the fund to be a charge against the Consolidated Revenue Fund.
3. There are two main streams of entitlements provided for police officers in the Act, in ss 7 and 8, and ss 10 to 10C.
  - i. Sections 7 and 8 provide for allowances upon retirement or discharge for incapacity other than that arising from being hurt on duty which are 'stepped' according to years of service (see also ss 13 and 14);
  - ii. Sections 10 to 10C provide for more generous allowances upon discharge for incapacity from a specified infirmity where the member is hurt on duty which do not depend on years of service (see also ss 12, 12A-D and 13A).
4. The manifest legislative purpose of the second stream is to provide additional recompense, at least partly funded by the public revenue, to former police officers who are incapacitated

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by an infirmity caused by the officer having been hurt on duty. It is no part of that purpose to recompense such persons for infirmities arising from other causes.

### **Appellant's Submissions (AS) [37]-[41].**

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

5. The operation of s 10(1A)(b) is limited to members who fall within the definition of "disabled member of the police force". **AS [42]**. That definition imports the certification and determination provisions under s 10B(1) and (3). Satisfaction of s 10B(1) is by its terms expressed as a precondition to a grant under s 10.
6. The "specified infirmity" must be one that was subject of a certification under s 10B(1), and "that infirmity" must have been determined under s 10B(3) to have been caused by the member being hurt on duty. **AS [42]-[46]**.
7. The definition of "disabled member of the police force" is to be read into the chapeau of s 10(1A). Relevantly, it applies to a member *certified to be incapable from a specified infirmity*, one *determined* to have been caused by the member being hurt on duty, of discharging the functions of a police officer.
8. The "incapacity" in s 10(1A)(b)(ii) is in context to be read as a reference to the incapacity ("incapable") read into the chapeau of s 10(1A) through the definition. The hurt on duty infirmity is the touchstone for the determination of incapacity for work outside the police force. **AS [48]-[50]**.
9. As s 10(1A)(b) applies "except where paragraph (c) applies", s 10(1A)(c) must be construed in order to determine the scope of s 10(1A)(b).
10. The text and context of the chapeau of (1A)(c) makes it tolerably clear that the incapacity referred to - "totally incapacitated" - is that arising from the hurt on duty injury that is referred to in the next line. Total incapacity can fall for consideration under both (1A)(b) and (c). This is a powerful contextual factor favouring a consistent reading of "incapacity" in s 10(1A)(b)(ii), whether or not a different construction could be rationalised: **cf Sackville AJA at Appeal Book (AB) 121-2 [81]-[87]; cf Payne JA at [7]-[8]; AS [53]-[59], [88]**.
11. The legislative history and extrinsic materials (including headings, and second reading speech) confirm the appellant's contended interpretation: **AB 63 [80]; AS [65], [27]-[36] [39]-[42], [60]-[66]**.

#### *Relevant factual background*

12. It is agreed as between the parties that
  - i. on 28 August 2003, 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; and

- ii. 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 2003, pursuant to s 10B(3)(a) of the Act,

such that he is a “disabled member of the police force”.

**AS [6]-[7]; Appellant Reply Submissions (Reply) [6]; AB 101-102**

13. Importantly, and as also agreed between the parties, the respondent was not certified and/or discharged for any psychiatric problem. The respondent's claim subject of this appeal was a claim to have his pension entitlement under s 10(1A)(b) of the Act increased by reason of suffering from PTSD, rather than by reason of any of the orthopaedic infirmities for which he was certified and which were subject of the determination: **AS [13]-[15]; Reply [5]**.
14. When the respondent's factual circumstances are considered in light of the Act properly construed, the only conclusion is that his PTSD was neither an infirmity nor an incapacity falling within the operation of s 10(1A)(b)(ii), and that it is only those infirmities that are certified and determined under s 10B that are relevant for s 10(1A)(b)(ii): **AS [71], [88]-[90], Reply [9], [13]**.

*Majority of the Court of Appeal erred*

15. The majority of the Court of Appeal found that once the “mandatory pre-condition” or “gateway” of some infirmity having been certified under s 10B 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 infirmity: **AB 99 [9] (Payne JA); AB 110-111 [46], AB 114-118 [57]-[69], [70] (Sackville AJA); AS [74]-[75]; Reply [7]**.
16. In so finding, Sackville AJA (and Payne JA) erred by starting with the literal meaning of s 10(1A)(b)(ii), prioritising text over context rather than reading text in context: **AB 112-113 [53], AB 114 [57]-[58], AB 118 [70]-[72]; AB 97-98 [3]-[5], AB 99-100 [9]-[13]; AS [23]-[25], [74]-[87]; Reply [7]-[13]**.
17. Schmidt J, who from AB 126 [100]-[101] applied a contextual and purposive construction, emphasised the primacy of s 10B and the certification and determination required thereunder. Her Honour held, correctly with respect, 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: **AS [76], [90]**.

Dated 16 August 2018



Neil Williams SC

Terence Ower

Surya Palaniappan