



**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST**

Case: S ECI 2024 01683

No. S ECI 2024 01683 09/2024 03:58 PM

BETWEEN

ELWYN GONSALVEZ
and others named in the Schedule

Plaintiffs

-and-

EMERGENCY SERVICES SUPERANNUATION BOARD

Defendant

DEFENCE

Date of document: 16 September 2024

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AA. Preliminary

1AA. In response to the Statement of Claim filed by the Plaintiffs on 11 April 2024
(**SOC**), the Defendant (the **Board**):

(a) says that, unless otherwise indicated:

(i) terms defined in the SOC have the same meaning in this Defence,
without any admission;

- (ii) the Defence adopts the headings used in the SOC, without any admission;
- (b) any admissions or allegations herein are made solely for the purposes of the present proceedings.

AB. Improper jurisdiction

2AA. The Board says that:

- (a) the allegations in this proceeding by former members and current members are a matter of public law and constitute a dispute under section 45 of the TS Act;
- (b) the relief sought at paragraphs B and C of the SOC are in the nature of mandamus and may only be granted in a proceeding commenced in accordance with Order 56 of the Supreme Court (General Civil Procedure) Rules 2015 (**GCP Rules**);
- (c) in the premises of subparagraphs 2AA(a) and (b), the proceeding has not been commenced in accordance with the GCP Rules; and
- (d) the plaintiffs should re-file their claim correctly by originating motion in compliance with the GCP Rules.

Particulars

- (A) The Board is a public entity with statutory duties and functions. The Board refers to and repeats paragraphs 5, 27 and 28 below.
- (B) In 2014 the Victorian government entered into a Heads of Government Agreement (**HOGA**) with the Commonwealth government in relation to the Victorian exempt public sector superannuation schemes (as defined by the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**)). The HOGA acknowledges that exempt public sector schemes, like the Scheme, are publicly accountable for their administrative effectiveness and efficiency and performance through legislative and other arrangements under Victorian legislation and are therefore

generally exempt from the provisions of the SIS Act. Under the HOGA there was an undertaking by the Victorian Government to ensure the exempt public sector superannuation schemes conform with the principles of the Commonwealth's retirement incomes policy to the best of its endeavours. Consistent with the HOGA subsections 6(4) and 6(5) of the ESS Act require the Board to give consideration to statements of (Victorian) government policy issued to the President of the Board and publish them.

- (C) Since privatisation of the Victorian public transport system in or about 1999, employer contribution rates set under the TS Act for the relevant private sector employers have been reviewed each year based on the salary experience of each private sector employer. Adjustments to contribution rates reflect the impact of the cost of providing benefits that arise from salary adjustments and must be determined by the Board. The Board relies upon actuarial advice for the purpose of setting those contribution rates for private sector employers.
- (D) Subsection 45(1) of the TS Act provides that any dispute under the TS Act must be determined in the first place by the Board.
- (E) Subsection 45(2) provides that a person whose interests are affected by a decision of the Board may apply to the Victorian Civil and Administrative Tribunal for review of the decision and such an application must be made within 28 days after the later of the day on which the decision was made or the giving of a statement of reasons.
- (F) The Board relies on rules 56.01 and 56.02 of the GCP Rules.

AC. Limitation Defence

3AA. In the alternative to paragraph 2AA, the Board says that the right of action of Group Member, being a former member who received a Defined Benefit under the TS Act prior to 11 April 2018, is statute barred by the *Limitation of Actions*

Act 1958 (Vic) and liable to be struck out to the extent the proceeding relates to claims by those Group Members.

Particulars

- (A) The Board relies on subsections 5(1), 5(8) and 21(2) of the Limitation of Actions Act.
- (B) Former members who ceased service and became entitled to the payment of benefit under the TS Act prior to 11 April 2018 have not commenced their action for breach of trust or breach of statutory duty within 6 years.
- (C) The exceptions provided under sections 21(1)(b) and (c) of the Limitation of Actions Act for fraud or recovery of trust property in the trustee's possession do not apply.
- (D) Sections 5(1) and 5(8) of the Limitation of Actions Act also apply to the former members, described in paragraph (B) above, seeking equitable relief for breach of statutory duty by analogy.

(The remainder of this Defence proceeds under cover of the objections of the Board under paragraphs 2AA and 3AA above.)

A. Parties and Group Member

A1. The Plaintiffs

1 As to paragraph 1 of the SOC, the Board:

(a) says that:

- (i) on 31 May 1996, pursuant to the *Superannuation Acts (Amendment) Act 1996* (Vic), the Transport Superannuation Fund (established under the TS Act) was merged into the State Superannuation Fund (established under the *State Superannuation Act 1988* (Vic));
- (ii) since 1 December 2005, pursuant to the *Superannuation Legislation (Governance Reform) Act 2005* (Vic), the State Superannuation Fund has been integrated with the Scheme;

- (iii) despite the merger of the Transport Superannuation Fund into the State Superannuation Fund on 31 May 1996 and the integration of the State Superannuation Fund with the Scheme on 1 December 2005, the benefits and entitlements conferred by, and the duties and obligations imposed under, the TS Act continued to operate; and
 - (iv) to the extent the Scheme is administered under the TS Act it is generally referred to as the “Transport Scheme” (**Transport Scheme**);
- (b) admits that it has administered the Transport Scheme since 1 December 2005 and says further that it has done so pursuant to the objectives, duties, functions and powers it has under Part 2 of the ESS Act, including functions and powers conferred or imposed by the TS Act;
 - (c) says that the Transport Scheme has been closed to new members since 31 December 1993;
 - (d) admits Gonsalvez was a member of the Transport Superannuation Fund prior to it being merged into the State Superannuation Fund on 31 May 1996;
 - (e) admits Gonsalvez was in the employ of Metro before he retired from Metro on about 30 June 2023;
 - (f) admits Gonsalvez was a member of the Transport Scheme until about 18 September 2023; and
 - (g) says that Gonsalvez is taken to have been a member of the Transport Scheme since 7 January 1989; and
 - (h) otherwise denies the allegations in paragraph 1.

2 As to paragraph 2 of the SOC, the Board:

- (a) admits Ferraro was in the employ of Metro before he retired from Metro on or about 10 August 2023;

- (b) admits that Ferraro was a member of the Transport Superannuation Fund prior to it being merged into the State Superannuation Fund on 31 May 1996;
- (c) admits Ferraro was a member of the Transport Scheme until about 10 August 2023; and
- (d) says that Ferraro is taken to have been a member of the Transport Scheme since 21 January 1976; and
- (e) otherwise denies paragraph 2.

3 As to paragraph 3 of the SOC, the Board

- (a) admits Seventis is an employee of Metro;
- (b) admits that Seventis was a member of the Transport Superannuation Fund prior to it being merged into the State Superannuation Fund on 31 May 1996;
- (c) admits that Seventis is currently a member of the Transport Scheme; and
- (d) says that Seventis is taken to have been a member of the Transport Scheme since 5 March 1990; and
- (e) otherwise denies paragraph 3.

A2. The Board

4 As to paragraph 4 of the SOC, the Board:

- (a) admits it is a body corporate capable of being sued;
- (b) says further that it is a body corporate established under and governed by the terms of the ESS Act and is a public entity under section 5 of the *Public Administration Act 2004 (Vic)*; and
- (c) the Board typically consists of 12 individuals appointed by the Governor in Council of whom 6 are nominated by the Minister pursuant to section 7 of the ESS Act and 6 are member-elected.

Particulars

At present the Board consists of 10 members, 5 of whom are nominated by the Minister and 5 of whom are member-elected, with there being 2 vacancies.

A3. Group Members

5 As to paragraph 5 of the SOC, the Board:

- (a) admits the Plaintiffs bring the proceeding as a group under Part 4A of the *Supreme Court Act 1986* (Vic) on behalf of themselves and persons alleged to be former and current members of the Transport Scheme;
- (b) says that the allegations relating to “former members” performing shift work, in the absence of proper particularisation of:
 - (i) the employers for whom such shift work was performed;
 - (ii) the relevant employment contracts and industrial instruments;
 - (iii) the extent to which a member’s Shift Penalty Allowance has been taken into account in their Defined Benefit;
 - (iv) the type(s) of shift work that was performed by “former members”; and
 - (v) the extent to which shift work has been performed, including whether it was regularly performed,

are vague and defective and liable to be struck out;

Particulars

The allegations fail to:

- (A) identify the employers for whom the former members performed shift work, with only Metro being identified as an employer in the SOC;
- (B) specify the employment contracts and industrial instruments necessary for: (i) the determination of whether members are

performing shift work; and (ii) the calculation of the alleged Shift Penalty Allowances, other than the 2 contracts specified in paragraph 26 of the SOC (which contracts only relate to Metro and its employees).

- (C) recognise that the Board does not have access to or maintain any member payroll records itself and is reliant upon the employers providing it with salary data for members (including, since 1 July 2008 ordinary time earnings (OTE) data for the purpose of determining minimum superannuation guarantee benefits), with an annual update of superable salary data occurring on each annual salary review date (currently 1 September);
- (D) address the circumstances of any predecessor employers who employed former members who may have made applications for inclusion of shift allowances in superable salary of some or all of their employees. For example, Metro was registered on 2 April 2009 and enterprise agreements describe its predecessors prior to that time as including Hillside Trains Corporation, Bayside Trains Corporation, Thiess Infracore, National Express (operator of the metro network until December 2002 trading as “M>Train”), CGEA Transport Asia Pacific Holdings (later known as “Connex”), GEC Alstom Australia Ltd (later known as “Alstom”), and Mainco (subcontractor of Connex that was responsible for the maintenance of the metro network);
- (E) identify the period for which the Defined Benefits were alleged to have been received by former members of the Transport Scheme, which would then define the relevant period or periods for the receipt of the Shift Penalty Allowances by former members;
- (F) make clear whether former members who did receive a Defined Benefit - calculated by reference to their final average salary

which included some of, but not all of, their Shift Penalty Allowances, are also Group Members; and

- (G) make clear whether the allegations are made in respect of former members for whom the Board has approved and gazetted a schedule of shift allowances in an aggregated form. For example, an aggregated value of 36% representing the “Penalty payments for shifts performed on a Sunday”, “Underground loop allowance”, “Shift Allowances (Early, Afternoon & Night)”, “On the Job Trainer (OJT) allowance payments”, “Discretionary Day Off (DDO) payment” and “Public Holiday penalty payments” was approved and gazetted on 26 June 2008 in respect of “Metropolitan Train Drivers” covered by the Metropolitan Train Drivers covered by the Connex Melbourne Union Collective Agreement 2006–2009;
- (c) says that the allegations relating to “current members” performing shift work in the absence of proper particularisation of:
- (i) the employers for whom such shift work is performed; and
 - (ii) the relevant employment contracts and industrial instruments;
 - (iii) the type(s) of shift work that is performed by “current members”; and
 - (iv) the extent to which shift work is performed, including whether it is regularly performed,
- are vague and defective and liable to be struck out;

Particulars

The allegations fail to:

- (A) identify the employers for whom the current members perform shift work, with only Metro being identified as an employer in the SOC;

(B) specify the contracts relevant to the calculation of the alleged Shift Penalty Allowances, other than the 2 contracts specified in paragraph 26 of the SOC (which contracts only relate to Metro and its employees).

(d) otherwise does not know and therefore cannot admit the allegations in the paragraph.

6 As to paragraph 6 of the SOC, the Board does not plead to the paragraph because it makes no allegation of fact against it.

7 As to paragraph 7 of the SOC, the Board does not know and therefore cannot admit the allegations in the paragraph.

8 As to paragraph 8 of the SOC, the Board:

(a) refers to and repeats subparagraphs 5(b) and 5(c) above; and

(b) based upon those matters, says it does not know and therefore cannot admit the allegations in paragraph 8.

B. The Transport Fund

9 The Board admits the allegations in paragraph 9 of the SOC.

10 The Board admits the allegations in paragraph 10 of the SOC.

11 As to paragraph 11 of the SOC, the Board:

(a) admits that upon the commencement of the TS Act on 1 July 1988 a public sector body corporate, known as the Transport Superannuation Board, was established;

(b) admits that the role of the Transport Superannuation Board was to administer the Transport Superannuation Fund;

(c) says that the role of the Transport Superannuation Board in administering the Transport Superannuation Fund was described in section 6 of the TS Act (as it then was); and

Particulars

The objectives and duties of the Transport Superannuation Board under the TS Act (as it then was) were to:

- (A) collect contributions;
 - (B) manage and invest the Transport Superannuation Fund;
 - (C) administer the payment of benefits having due regard to the need for equity among members, pensioners and beneficiaries; and
 - (D) perform the duties described in subsection 6(2) of the TS Act (as it then was).
- (d) says further that the power of investment of the Transport Superannuation Board and its obligation to keep accounts were described in sections 18 and 19 of the TS Act (as it then was).

Particulars

- (A) Section 18 of the TS Act (as it then was) provided for the Transport Superannuation Board to have the powers conferred on it by the *Borrowing and Investment Powers Act 1987* (Vic).
- (B) Section 19 of the TS Act (as it then was) required the Transport Superannuation Board to, inter alia, keep proper accounts and records of its transactions and affairs and any other records as will sufficiently explain its financial operations and position.
- (C) Investment responsibilities for the Defined Benefit assets were transferred to the Victorian Funds Management Corporation (**VFMC**) on 1 July 2006. For defined benefit assets, the Board has a framework for setting investment objectives which involves an external advisor and VFMC.

- 12 The Board denies the allegation in paragraph 12 of the SOC, and says further that:

- (a) the Transport Superannuation Board was not (and never has been) the trustee of the Transport Superannuation Fund;
- (b) the Transport Superannuation Board did not owe (and never has owed) equitable obligations to the members of the Transport Superannuation Fund;
- (c) the Transport Superannuation Board had obligations imposed upon it by statute for the purpose of managing the Transport Superannuation Fund.

Particulars

- (A) All of the members of the Transport Superannuation Board were appointed by the Governor in Council pursuant to section 7 of the TS Act (as it then was).
- (B) The Transport Superannuation Board had objectives and duties prescribed by section 6 of the TS Act (as it then was).
- (C) The assets forming the Transport Superannuation Fund were held and accounted for by the Transport Superannuation Board pursuant to the provisions of the TS Act (as it then was).
- (D) The contributions to be paid by transport authorities and by members and the benefits payable to members were prescribed by Parts 6 and 7 of the TS Act (as it then was).
- (E) Section 45 of the TS Act (as it then was) provided for any dispute to be determined in the first place by the Board with a right for an aggrieved person to appeal to the Administrative Appeals Tribunal.

13 The Board denies the allegations in paragraph 13 of the SOC, and:

- (a) refers to and repeats paragraph 12 above; and
- (b) says further that the obligations of the Transport Superannuation Board were as described under paragraph 11 above and were strictly statutory

obligations imposed upon it for the statutory purposes of the TS Act (as it then was).

Particulars

The Board refers to and repeats the particulars at paragraphs 11 and 12 above.

14 The Board denies the allegations in paragraph 14 of the SOC.

Particulars

The Board refers to and repeats paragraphs 12 and 13 above.

15 As to paragraph 15 of the SOC, the Board:

- (a) admits the allegations at subparagraphs 15(a), 15(b)(i), 15(d) and 15(e);
- (b) refers to and repeats subparagraphs 1(a) and 1(b) above;
- (c) says further that from 1 December 2005:
 - (i) the assets and liabilities of the State Superannuation Fund, into which the Transport Superannuation Fund had previously merged on 31 May 1996, were transferred to the Scheme and formed part of the Scheme;
 - (ii) the Board became the successor to the Government Superannuation Office (**GSO**) who, since 31 May 1996, had been responsible for the administration of the State Superannuation Fund; and

Particulars

(A) Subsections 22DB(1) and 22DC(1)(d)-(f) of the ESS Act inserted by operation of the *Superannuation Legislation (Governance Reform) Act 2005* (Vic).

(B) Section 6 of the ESS Act.

(d) otherwise denies the allegations in paragraph 15.

16 The Board admits the allegation at paragraph 16 of the SOC.

C. Member “salary” and entitlements

17 As to paragraph 17 of the SOC, the Board:

- (a) says that a member’s dependants, or if a member has no dependants, the member’s personal representative, become entitled to be paid a benefit upon the member’s death;
- (b) otherwise admits the allegations at paragraph 17.

18 The Board admits the allegation at paragraph 18 of the SOC.

19 The Board admits the allegation at paragraph 19 of the SOC.

20 As to paragraph 20 of the SOC, the Board:

- (a) refers to an repeats subparagraph 17(a) above;
- (b) says that members retiring on the ground of disability before the age of 60 years are entitled to a pension for life pursuant to subsection 31(1) of the TS Act;
- (c) says that members resigning with less than 5 years of service are not entitled to a benefit by reference to their Accrued Retirement Benefit pursuant to subparagraph 35(1)(b)(ii) of the TS Act; and
- (d) otherwise admits the allegation at paragraph 20.

21 The Board admits the allegation at paragraph 21 of the SOC.

22 The Board admits the allegation at paragraph 22 of the SOC.

23 The Board admits the allegation at paragraph 23 of the SOC.

24 The Board admits the allegation at paragraph 24 of the SOC.

25 As to paragraph 25 of the SOC, the Board:

- (a) says that there are also express exclusions from the definition of salary;
- (b) says further that for an employee performing shift work, salary only includes the additional annual amount of remuneration calculated as described in

subparagraph 25(b) of the SOC if the shift work has been performed for not less than 3 years immediately prior to the date on which the benefits become payable; and

- (c) otherwise admits the definition of salary described in paragraph 25.

Particulars

- (A) The Board will rely at trial upon the entire terms of the definition of Salary under the *TS Regulations 2018* and the predecessor regulations.

- (B) The Board relies upon receiving salary data from the employers and refers to and repeats the particulars under paragraph 5 above.

26 As to paragraph 26 of the SOC, the Board:

- (a) refers to and repeats subparagraphs 5(b) and 5(c) above;
- (b) says that the Shift Penalty Allowance will only form part of a member's salary for the purpose of calculating benefits if:
 - (i) it relates to shift work that has been performed for not less than 3 years immediately prior to the date on which the benefits become payable; and
 - (ii) it has been approved by the Board and published in the Government Gazette;
- (c) otherwise admits the allegation in paragraph 26.

Particulars

- (A) The Board refers to and repeats the particulars under paragraphs 5 and 25 above.

- (B) The GSO had approved policies for the approval of shift allowances for the *State Superannuation Act 1988* and the *TS Act* each with an operative date of 25 February 2003. Pursuant

to this policy, factors relevant to approval of shift allowances included (which continue to be factors which the Board takes into account):

- (i) whether the shift allowance payments were likely to be ongoing and not of a temporary nature and were capable of reasonably accurate prediction in advance;
 - (ii) the relevant kinds of evidence to be considered by the GSO prior to approving a shift allowance, including whether the working of shifts was included in a contract of employment or job description, whether the working of shifts was a necessary incident of the position, whether an officer can be compelled to work shifts, whether all officers working in similar positions are working similar shifts, and whether past experience over the preceding years supports the view that the shifts allowance payments are ongoing and predictable; and
 - (iii) the views of the member and the employer in exercising the discretion to approve shift allowance payments.
- (C) The GSO also approved written procedures and requirements for the approval of shift allowances forming “salary”. Those procedures were based upon the GSO having a discretion to approve shift allowances, noting that, in contrast to the State Superannuation Act and the TS Act, under the *State Employees Retirement Benefits Act 1979* (Vic) (**SERB Act**) the definition of “salary” under section 2 of the SERB Act expressly included shift allowances (without any approval process) if as a matter of construction they were determined to be financial remuneration payable periodically and regularly for the performance of the duties of the grade of employment, but not of an incidental or temporary nature.
- (D) The procedure, which continues to be adopted by the Board, involves a request for recognition of a shift allowance being

received by the GSO/Board, pursuant to which the employer then is required to provide supporting information, including:

- (i) a list of shift allowances to be approved and details of the nature of the shift allowance (ie the type of work and hours of work it is applied to);
 - (ii) relevant employment contracts, enterprise agreements or other documents governing the payment of shift allowances;
 - (iii) a list of the employees covered by the shift allowance; and
 - (iv) confirmation that shift allowance inclusion as superable salary cannot be made retrospective and would only take effect when approval is granted by the GSO/Board delegate and it has been gazetted.
- (E) The Victoria Government Gazette is published by IVE Group Limited with the authority of the Government Printer for the State of Victoria. The Victoria Government Gazette provides official notification of decisions or actions taken by, or information from, the Governor of Victoria, Government Authorities, Government Departments, Local Councils, companies and individuals. It is a publishing service provided to the whole of Victorian government.

D. The Board's obligations in respect of the Transport Superannuation Fund

27 The Board denies the allegations in paragraph 27 of the SOC, and:

- (a) refers to and repeats paragraphs 12, 13, 14 and 15 above;
- (b) says that it has statutory duties imposed upon it under subsection 6(2) of the ESS Act, including:
 - (i) to establish policies for the administration of the TS Act;
 - (ii) to determine, authorise or approve programs for the administration of the TS Act;
 - (iii) to determine objectives for the investment of money in the Scheme;

- (iv) to have regard to the interests of persons entitled to benefits under the TS Act;
 - (v) to have regard to the interests of contributing employers under the TS Act;
 - (vi) to ensure that it has, or has access to, the skills, facilities and resources required to achieve its objectives;
 - (vii) to ensure that its decisions and operations are directed towards achieving the objectives of the Board under subsection 6(1) of the ESS Act, including to administer the payment of benefits under the TS Act;
 - (viii) subject to the need to protect information the disclosure of which could adversely affect the financial position or the commercial or other operations of the Board, to inform members about their rights and the benefits under the TS Act and about the management and investment of the Scheme;
 - (ix) subject to the need to protect information the disclosure of which could adversely affect the financial position or the commercial or other operations of the Board, to liaise with relevant industrial organisations about the interests of members and inform those organisations about the management and investment of the Scheme; and
 - (x) to ensure that the Board conducts its operations in an efficient manner.
- (c) in performing benefit calculations under the TS Act the Board has no equitable obligations imposed upon it expressly or impliedly by any term of the ESS Act, the TS Act, or otherwise.

Particulars

(A) Section 6 of the ESS Act.

(B) The Board refers to and repeats the particulars under paragraphs 12, 13 and 15 above.

- 28 The Board denies the allegations in paragraph 28 of the SOC, and:
- (a) refers to and repeats paragraphs 12, 13, 14 and 15 above;
 - (b) says that it has no positive duty expressly or impliedly under the ESS Act, the TS Act, the TS Regulations or otherwise that compels the Board to collect information in relation to Shift Penalty Allowances;
 - (c) says that it has a statutory power under section 38 of the TS Act to require employers and members to provide it with information for the purposes of the TS Act, which may be exercised from time to time as the occasion requires;
 - (d) says that it is not compelled to exercise this power under the TS Act exclusively in the interests of the member and without regard to the interests of contributing employers and other objectives it has under the ESS Act; and
 - (e) says that it has the statutory duties imposed upon it under the ESS Act as described in subparagraph 27(b) above.

Particulars

- (A) The Board refers to and repeats paragraphs 12, 13, 14, 15, 26 and 27 above and the particulars under those paragraphs.
- (B) The Board does not typically seek data from employers or members about Shift Penalty Allowances unless and until there is an application made to the Board for the inclusion of a Shift Penalty Allowance in the definition of salary pursuant to the TS Regulations 2018 and the predecessor regulations.
- (C) The Board relies upon employers providing it with salary data for members which includes their Shift Penalty Allowances where those allowances have been approved by the Board pursuant to the TS Regulations 2018 and predecessor regulations. The Board refers to and repeats the particulars under paragraph 5 above.

(D) The Board's power to gather information from employers may be exercised by the Board from time to time as the occasion requires pursuant to section 40 of the *Interpretation of Legislation Act 1984* (Vic) (**Interpretation Act**).

29 The Board denies the allegations in paragraph 29 of the SOC and:

- (a) says that it is required to calculate a member's Defined Benefit under the TS Act so that the member's salary includes a Shift Penalty Allowance if that Shift Penalty Allowance has been approved by the Board and gazetted pursuant to regulation 7(2)(e) of the *TS Regulations 2018* (or any predecessor provisions) provided that the member has performed the shift work for not less than 3 years immediately prior to the date at which the benefit became payable;
- (b) says further that there is no positive duty imposed on the Board expressly or impliedly under the ESS Act, the TS Act, the TS Regulations or otherwise that compels the Board to approve and publish schedules of Shift Penalty Allowances; and
- (c) refers to and repeats paragraphs 26, 27 and 28 above.

Particulars

- (A) The Board refers to and repeats the particulars under paragraphs 26, 27 and 28 above.
- (B) The definition of "salary" is also relevant to contributions to be paid by members and employers pursuant to the TS Act: sections 27 and 28 of the TS Act. Members may elect a contribution percentage rate of 0%. Employer contribution rates are typically specified as a rate of "salary" based upon actuarial recommendations.
- (C) The role of the Board under regulation 7(2)(e) of the TS Regulations 2018 (and the predecessor provisions) in approving a schedule of allowances is a power of the Board.

(D) The exercise of that power by the Board requires the Board to have regard to the interests of members and to the contributing employers of the Transport Scheme pursuant to statutory duties imposed on it under the ESS Act. (See subparagraph 27(b) above.)

(E) That power may be exercised by the Board from time to time as occasion requires: section 40 of the Interpretation Act.

30 The Board denies paragraph 30 of the SOC and:

(a) says that it is required to pay a member's Defined Benefit under the TS Act calculated in accordance with the relevant benefit provisions of the TS Act; and

(b) refers to and repeats paragraphs 27, 28 and 29 above.

31 The Board denies paragraph 31 of the SOC and:

(a) says that a Terminating Member's final average salary used to calculate their Defined Benefit will be determined by reference to a Shift Penalty Allowance that they were paid for performing shift work only in the circumstances set out in subparagraph 29(a) above; and

(b) refers to and repeats paragraph 30 above.

E. The Plaintiffs' Defined Benefit entitlements

32 As to paragraph 32 of the SOC, the Board:

(a) says that payslips issued to Gonsalvez, produced to the Board as part of this proceeding (but not ordinarily in the possession of the Board), record that he received payment for some Shift Penalty Allowances during the period of his employment;

(b) refers to paragraph 1(g); and

(c) otherwise does not know and therefore cannot admit the allegations in paragraph 32.

Particulars

The Board refers to and repeats the particulars under paragraph 28 above.

33 As to paragraph 33 of the SOC, the Board:

- (a) says that payslips issued to Ferraro, produced to the Board as part of this proceeding (but not ordinarily in the possession of the Board), record that he received payment for some Shift Penalty Allowances during the period of his employment;
- (b) refers to paragraph 1(d); and
- (c) otherwise does not know and therefore cannot admit the allegations in paragraph 33.

Particulars

The Board refers to and repeats the particulars under paragraph 28 above.

34 As to paragraph 34 of the SOC, the Board:

- (a) says that payslips issued to Seventis, produced to the Board as part of this proceeding (but not ordinarily in the possession of the Board), record that he has received payment for some Shift Penalty Allowances during the period of his employment; and
- (b) otherwise does not know and therefore cannot admit the allegations in paragraph 34.

Particulars

The Board refers to and repeats the particulars under paragraph 28 above.

F. The Board's breaches of duty

- 35 The Board denies paragraph 35 of the SOC and refers to and repeats paragraphs 27, 28 and 29 above.
- 36 The Board denies paragraph 36 of the SOC and refers to and repeats paragraphs 30 and 31 above.
- 37 The Board denies the allegations in paragraph 37 of the SOC and refers to and repeats paragraphs 27, 28, 29, 30 and 31 above.
- 38 The Board denies the allegations in paragraph 38 of the SOC and refers to and repeats paragraphs 27, 28, 29, 30 and 31 above.

G. Disputed conception of the Board's duties

- 39 As to paragraph 39 of the SOC, the Board:
- (a) admits a letter dated 3 February 2023 was sent by the plaintiffs' solicitors to the Board;
 - (b) denies that the letter articulated the allegations of the Benefit Calculation Duty, the Information Gathering Duty or the Benefit Payment Duty in the terms of the SOC;
 - (c) says that the letter concerned Gonsalvez's benefits under the Transport Scheme having been calculated by a superable salary not including shift penalty allowances paid to Gonsalvez.
- 40 As to paragraph 40 of the SOC, the Board:
- (a) admits that it sent a letter dated 30 March 2023 to the plaintiff's solicitors responding to their letter of 3 February 2023;
 - (b) denies that the letter was responding to allegations of the Benefit Calculation Duty, the Information Gathering Duty or the Benefit Payment Duty articulated in the terms of the SOC;
 - (c) says that the Board's letter confirmed that in 2017 Metro had commenced an application process for approval of certain shift penalty allowances but

that Metro did not ultimately provide sufficient information to complete the application process despite subsequent and repeated requests for such information.

41 The Board denies paragraph 41 of the SOC and:

- (a) says that the allegations are speculative and hypothetical, and liable to be struck out, insofar as they relate to future events and necessarily rely upon numerous assumptions that are not stated;
- (b) says that based upon the current provisions of the TS Act a benefit will be payable to or in respect of Seventis upon a Fund Membership Termination Event which benefit will be calculated pursuant to the provisions of the TS Act;
- (c) says that any Defined Benefit payable to Seventis based upon his final average salary should only include his Shift Penalty Allowances to the extent the circumstances described in subparagraph 26(b) above apply, including his performing shift work for not less than 3 years immediately prior to the date on which his benefit becomes payable; and
- (d) says that the Board has not approved a schedule of Shift Penalty Allowances, or published such a schedule in the Government Gazette, that is relevant to determining the Salary for Seventis under the TS Regulations 2018 (or any predecessor provisions).

42 The Board denies paragraph 42 of the SOC, and:

- (a) refers to and repeats paragraph 41 above; and
- (b) says that if Seventis wishes to dispute a matter concerning the TS Act it must be dealt with in the first instance in accordance with section 45 of the TS Act.

Particulars

The Board refers to and repeats the particulars under paragraph 2AA above.

H. Common questions of fact or law

43 As to paragraph 43 the Board does not plead to the paragraph as it makes no allegation of fact against it.

I. Relief sought

44 The Board denies the plaintiffs and Group Members are entitled to the relief identified at paragraphs A to E of the SOC (or any relief at all) and the Board further says:

- (a) as to paragraph A, to the extent the declaratory relief is sought in relation to current members it relates to a question which is purely hypothetical because the circumstances in respect of which the declaration is sought have not occurred and may never occur;
- (b) as to paragraphs B and C:
 - (i) the relief sought is in the nature of mandamus and paragraph 2AA is referred to and repeated; and
 - (ii) in any event the relief cannot be granted so as to cause the Board to approve a schedule of allowances with retroactive operation in terms not contemplated by the legislature.

Dated: 16 September 2024

C. O. Parkinson KC
S. Mackenzie
Counsel for the Defendant

Gilbert + Tobin
Solicitors for the Defendant

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST**

No. S ECI 2024 01683

Schedule of Parties

Elwyn Gonsalves	First Plaintiff
Sebastiano Ferraro	Second Plaintiff
Basil Seventis	Third Plaintiff
Emergency Services Superannuation Board	Defendant