FEDERAL COURT OF AUSTRALIA

Deputy Commissioner of Taxation (Superannuation) v Ryan [2015] FCA 1037

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| Citation: | Deputy Commissioner of Taxation (Superannuation) v Ryan [2015] FCA 1037 |
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| Parties: | **ALISON LENDON, IN HER CAPACITY AS DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) v CAROLYN ROBYN RYAN and JOSEPH RYAN** |
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| File number: | QUD 453 of 2015 |
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| Judge: | **EDELMAN J** |
|  |  |
| Date of judgment: | 18 September 2015 |
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| Catchwords: | **SUPERANNUATION** – pecuniary penalties for admitted contraventions of ss 62(1), 65(1), 84(1), and 109(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) – declarations of contraventions |
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| Legislation: | *Crimes Act 1914* (Cth)s 4AA  *Evidence Act 1995* (Cth) s 191  *Superannuation Industry (Supervision) Act 1993* (Cth) ss 3(1), 3(2), 34, 62, 62(1), 65, 65(1), 65(2), 82, 82(2), 83, 84, 84(1), 85(1), 109, 109(1), 109(1A), 126A, 193, 196, 196(1), 196(3), 196(4), 262A |
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| Cases cited: | *Australian Prudential Regulation Authority v Derstepanian* [2005] FCA 1121; (2005) 60 ATR 518  *Australian Prudential Regulation Authority v Holloway* [2000] FCA 1245; (2000) 45 ATR 278  *Deputy Commissioner of Taxation (Superannuation) v Graham Family Superannuation Pty Limited* [2014] FCA 1101  *Deputy Commissioner of Taxation v Lyons* [2014] FCA 1353  *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59  *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357  *Olesen (In his capacity as Deputy Commissioner of Taxation (Superannuation)) v MacLeod* [2011] FCA 229; (2011) 85 ATR 107  *Olesen (In his Capacity as Deputy Commissioner of Taxation (Superannuation)) v Parker* [2011] FCA 1096; (2011) 85 ATR 387  *Olesen v Early Sunshine Pty Ltd* [2015] FCA 12  *Olesen v Eddy (In his Capacity as Deputy Commissioner of Taxation)* [2011] FCA 13; (2011) 81 ATR 763  *Vivian (Deputy Commissioner of Taxation (Superannuation)) v Fitzgeralds* [2007] FCA 1602; (2007) 69 ATR 834  *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 |
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| Date of hearing: | 18 September 2015 |
|  |  |
| Place: | Brisbane |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 80 |
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| Counsel for the Applicant: | Mr G Del Villar |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the First and Second Respondents: | The First and Second Respondents appeared in person |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 453 of 2015 |

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| BETWEEN: | ALISON LENDON, IN HER CAPACITY AS DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION)  Applicant |
| AND: | CAROLYN ROBYN RYAN  First Respondent  JOSEPH RYAN  Second Respondent |

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| JUDGE: | EDELMAN J |
| DATE OF ORDER: | 18 SEPTEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

**Declarations**

*The 2009 contraventions*

1. The Respondents, as trustees of the Lawryan Family Superannuation Fund (the Fund), caused the Fund:
   1. On 12 June 2010, to make a loan to the Respondents, being members of the Fund, in the total sum of $17,298.42 without authorisation of the governing rules of the Fund,

and thereby contravened:

1.1. Section 62(1) of the *Superannuation (Industry) Supervision Act 1993* (Cth) (“Act”) by failing to ensure that the Fund was maintained solely for one or more of the purposes prescribed in 62(1) of the Act.

1.2. Section 65(1)(a) of the Act by lending money using the resources of the Fund to the Respondents, being members of the Fund.

1.3. Section 84 of the Act by making loans to members of the Fund which caused the market value ratio of the Fund's in-house assets to exceed 5% and thereby failing to take all reasonable steps to ensure that the provisions of Division 3 of Part 8 of the Act were complied with in respect of the Fund.

1.4. Section 109(1)(b) of the Act by making investments in their capacity as trustees of the Fund in circumstances where the other parties to those transactions, being the Respondents in their personal capacities, were not dealing with each other at arm's length in respect of each transaction and the terms and conditions of those transactions were more favourable to other parties than those which it is reasonable to expect would have applied if the trustees were dealing with those other parties at arm's length in the same circumstances.

*The 2010 contraventions*

2. The Respondents, as trustees of the Fund, caused the Fund between 1 July 2009 and 30 June 2010:

* 1. to make 20 loans to the Respondents, being members of the Fund, in the total sum of $53,133.25 without authorisation of the governing rules of the Fund and
  2. to fail to prepare or carry out a plan to address the excess in-house assets of the Fund that existed at the end of the year ended 30 June 2009

and thereby contravened:

2.1. Section 62(1) of the Act by failing to ensure that the Fund was maintained solely for one or more of the purposes prescribed in s 62(1) of the Act.

2.2. Section 65(1)(a) of the Act by lending money using the resources of the Fund to the Respondents, being members of the Fund.

2.3. Section 84 of the Act by making loans to members of the Fund which caused the market value ratio of the Fund's in-house assets to exceed 5% and by failing to prepare a plan setting out steps to ensure the disposal of in-house assets in excess of the 5% limit, and thereby failing to take all reasonable steps to ensure that the provisions of Division 3 of Part 8 of the Act were complied with in respect of the Fund.

2.4. Section 109(1)(b) of the Act by making investments in their capacity as trustees of the Fund in circumstances where the other parties to those transactions, being the Respondents in their personal capacities, were not dealing with each other at arm’s length in respect of each transaction and the terms and conditions of those transactions were more favourable to other parties than those which it is reasonable to expect would have applied if the trustees were dealing with those other parties at arm's length in the same circumstances.

*The 2011 contraventions*

3. The Respondents, as trustees of the Fund, caused the Fund between 1 July 2010 and 30 June 2011:

* 1. to make 19 payments to the Respondents, being members of the Fund, in the total sum of $69,570.23 without authorisation of the governing rules of the Fund
  2. to fail to prepare or carry out a plan to address the excess in-house assets of the Fund that existed at the end of the year ended 30 June 2010.

and thereby contravened:

3.1. Section 62(1) of the Act by failing to ensure that the Fund was maintained solely for one or more of the purposes prescribed in 62(1) of the Act.

3.2. Section 65(1)(b) of the Act by using the resources of the Fund to provide financial assistance to the Respondents, being members of the Fund.

3.3. Section 84 of the Act by failing to prepare or carry out a plan setting out steps to ensure the disposal of in-house assets in excess of the 5% limit and thereby failing to take all reasonable steps to ensure that the provisions of Division 2Part 8 of the Act were complied with in respect of the Fund.

*The 2012 contraventions*

4. The Respondents, as trustees of the Fund, caused the Fund between 1 July 2011 and 30 June 2012:

* 1. to make 28 payments to the Respondents, being members of the Fund, in the total sum of $69,67 4. 7 4 without authorisation of the governing rules of the Fund
  2. to fail to prepare or carry out a plan to address the excess in-house assets of the Fund that existed at the end of the year ended 30 June 2011.

and thereby contravened:

4.1. Section 62(1) of the Act by failing to ensure that the Fund was maintained solely for one or more of the purposes prescribed in 62(1) of the Act.

4.2. Section 65(1)(b) of the Act by using the resources of the Fund to provide financial assistance to the Respondents, being members of the Fund.

4.3. Section 84 of the Act by failing to prepare or carry out a plan setting out steps to ensure the disposal of in-house assets in excess of the 5% limit and thereby failing to take all reasonable steps to ensure that the provisions of Division 3 Part 8 of the Act were complied with in respect of the Fund.

5. Each of the contraventions referred to in declarations 1 to 4 above was a serious contravention within the meaning of s 196(4) of the Act.

**Civil penalties**

6. The first and second respondents pay to the Commonwealth monetary penalties in amounts of $20,000 each pursuant to s 193 of the *Superannuation Industry (Supervision) Act 1993* (Cth) to be paid in monthly instalments of over 3 years with monthly repayments of $555.55 by each of the first and second respondents.

**Costs**

7. The first and second respondents pay the costs of the applicant.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 453 of 2015 |

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| BETWEEN: | ALISON LENDON, IN HER CAPACITY AS DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION)  Applicant |
| AND: | CAROLYN ROBYN RYAN  First Respondent  JOSEPH RYAN  Second Respondent |

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| JUDGE: | EDELMAN J |
| DATE: | 18 SEPTEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

## Introduction

1. Mr and Mrs Ryan are married. From January 1999 until January 2014 (when they were disqualified from acting as a trustee) they were trustees, and the only members, of the Lawryan Family Superannuation Fund (the **Fund**). The Fund was a self-managed superannuation fund under the *Superannuation Industry (Supervision) Act 1993* (Cth) (the *SIS Act*). Over a three year period they committed contraventions of ss 62(1), 65(1), 84(1), and 109(1) of the *SIS Act*.
2. The Ryans had committed contraventions previously but the Deputy Commissioner had not taken the matter to court. This time the Deputy Commissioner seeks declarations and pecuniary penalties. For reasons I explain below, the orders sought should be made and the pecuniary penalties assessed in the sum of $20,000 each with monthly repayments over a period of three years.
3. None of the facts in this case is controversial. All the facts alleged in the Deputy Commissioner’s statement of claim were admitted and the parties provided a joint agreed statement of the following facts in accordance with s 191 of the *Evidence Act 1995* (Cth).

## Summary of the circumstances of the contraventions

1. Prior to 2007, the Ryans jointly purchased a dry-cleaning business. They invested their money in the business and obtained a line of credit to continue to support the business. But the business was not successful and in 2007 they sold it.
2. The proceeds of the sale of the dry-cleaning business did not clear the line of credit the respondents had taken out to support the business. The respondents continued to service the line of credit.
3. By 12 June 2009, the Ryans were unable to meet their everyday personal expenses including the line of credit and their other expenses. They started making withdrawals from the Fund to enable them to meet their expenses.
4. At the time the withdrawals commenced, Mr Ryan was employed as an insurance loss adjuster and Mrs Ryan was not employed. In the second half of 2010, Mrs Ryan obtained casual employment as an administrative assistant at a hospital.
5. The withdrawals occurred from 12 June 2009 until June 2012. Over this period some of the withdrawals were made as loans, and repaid. But the loans were unsecured, had no interest rate and no repayment term. Other withdrawals were not repaid. The total net amount withdrawn was $181,364 ($209,677 net of the repayments of around $28,313).
6. Between August and December 2012 the Fund lodged income tax returns and auditor reports for the financial years ending 30 June 2009, 30 June 2010, 30 June 2011, and 30 June 2012. The authors of the income tax returns and the auditor reports raised the possibility of contraventions of the *SIS Act* for those four financial years.
7. As a result of the income tax returns and the auditor reports, on 2 November 2012 the Commissioner commenced a further audit of the Fund. The Commissioner concluded from the audit that there appeared to have been contraventions of ss 34, 62, 65, and 109 of the *SIS Act* in relation to the management of the Fund.
8. On 16 October 2013, the Commissioner wrote to the Ryans asking each of them to show cause why they should not be disqualified from being trustees of superannuation entities.
9. On 19 November 2013, both Mr and Mrs Ryan wrote to the Commissioner acknowledging the contraventions, apologising for their actions, and offering to rectify the contraventions and then roll-over the superannuation benefits in the Fund and close the Fund.
10. On 14 January 2014, the Commissioner disqualified each of the Ryans from being a trustee of a superannuation entity, under s 126A of the Act.
11. Mr and Mrs Ryan did not rectify the contraventions. As a result of the contraventions, and accountants’ fees related to the Fund, at 1 June 2015, their superannuation benefits in the Fund have been reduced to $6,034.20.
12. On 22 May 2015, the Commissioner wrote to the Ryans advising that proceedings would be commenced for contraventions of the *SIS Act*.
13. On 1 June 2015, the Ryans transferred their superannuation benefits in the Fund to a public fund.

## The relevant provisions of the *SIS Act*

1. The sections of the *SIS Act* that the Ryans admit that they contravened are ss 62, 65, 84, and 109 of the *SIS Act.*
2. The object of the *SIS Act*, in s 3(1) includes making provision for the prudent management of certain superannuation funds. Those funds may also become eligible for concessional tax treatment (s 3(2)).
3. The first two provisions which the Ryans admit that they contravened are ss 62(1) and 65.
4. Section 62(1) provides for a “sole purpose test” and requires that each trustee of a regulated superannuation fund must ensure that the fund is maintained solely for one or more of the following purposes (the core purposes). In broad summary, these include matters such as (i) the provision of benefits for each member of the fund on or after the member’s retirement from any business; (ii) the provision of benefits after the member attains a particular age; (iii) the provision of benefits after death, and so on. The Ryans admit, and I find, that none of the circumstances in s 62(1) applied when they withdrew the money from the Fund. The Ryans knew this to be the case.
5. Section 65(1) contains prohibitions which include prohibiting a trustee of a regulated superannuation fund lending money of the fund to a member of the fund or a relative of a member of the fund or giving any other financial assistance using the resources of the fund to a member of the fund or a relative of a member of the fund. The Ryans admit, and I find, that their withdrawals from the Fund gave them financial assistance and contravened s 65(1).
6. The Ryans also admit that they contravened ss 84(1) and 109(1).
7. Section 84(1) provides, relevantly, that each trustee of a regulated superannuation fund must take all reasonable steps to ensure that the provisions of Division 3 are complied with. Those provisions include ss 82 and 83. Section 82 requires the trustees of a regulated superannuation fund to prepare and carry out a plan to reduce the Funds in-house asset (ie loans to, or investments in, a related party) market value ratio if it exceeds 5% at the end of a year of income. Where this market value ratio exceeds 5%, or will exceed 5%, s 83 prohibits a trustee from acquiring an in-house asset. The withdrawals from the Fund by the Ryans, of loans for their own purposes, caused the market value ratio to exceed 5%. They did not prepare or carry out a plan to reduce the in-house assets. They contravened s 84(1) by infringing ss 82 and 83.
8. Section 109(1) has the effect that a trustee of a superannuation entity must not invest in that capacity unless the trustee and the other party to the relevant transaction are dealing with each other at arm’s length in respect of the transaction or, if not, the terms and conditions of the transaction are no more favourable to the other party than those which it is reasonable to expect would apply if the trustee were dealing at arm’s length. The withdrawals by the Ryans, of loans for their own purposes, were not at arm’s length and were on more favourable terms than was reasonable to expect if they were at arm’s length. The Ryans contravened s 109(1).

## Pecuniary penalties for serious contraventions

1. Section 196 of the *SIS Act* applies if (by s 196(1)) the Court is satisfied that a person has contravened a civil penalty provision.
2. Each of sections 62(1), 65(1), 84(1), and 109(1) is a civil penalty provision: *SIS Act* s 193.
3. Sections 196(3) and 196(4) permit the Court to make a monetary penalty if the Court is satisfied that the contravention is a serious one.
4. I have no doubt that the contraventions in this case were serious. As Logan J explained in *Vivian (Deputy Commissioner of Taxation (Superannuation)) v Fitzgeralds* [2007] FCA 1602; (2007) 69 ATR 834, 841 [41], “the long-term object envisaged by the Parliament, to my mind, is to encourage Australians that they must make provision for their retirement, and to do that by the conferring of taxation benefits in return for responsible management of funds”. The contraventions in this case, amounting to almost the entire value of the Fund, put the savings of the Ryans at risk and did so in circumstances in which their contraventions were deliberate, repeated over a period of three years and were not first contraventions.

## Comparable pecuniary penalty cases

1. The Deputy Commissioner referred in footnotes to a selection of comparable pecuniary penalty cases. Each of these, and others, is considered below.

### Australian Prudential Regulation Authority v Holloway (2000)

1. In *Australian Prudential Regulation Authority v Holloway* [2000] FCA 1245; (2000) 45 ATR 278, Mr Holloway, an accountant, and Holloway & Co Pty Ltd, a company which owned his accountancy practice, contravened s 85(1) of the *SIS Act*. Mr Holloway had engineered “round robin” transactions. The contraventions involved attempts to secure benefits for clients, although in one instance the breach involved the Holloway & Co superannuation fund.
2. There was no evidence of the size of Holloway & Co, however Mansfield J inferred that it was a moderately sized suburban practice (at 281 [11]). Justice Mansfield did not address the financial capacity of either respondent. There was no evidence of past contraventions.
3. The total penalty imposed on Mr Holloway was $35,000. The total penalty imposed on Holloway & Co was $220,000. The penalty imposed in relation to the Holloway & Co superannuation fund was $40,000 on Holloway & Co and $12,000 on Mr Holloway.

### Australian Prudential Regulation Authority v Derstepanian (2005)

1. In *Australian Prudential Regulation Authority v Derstepanian* [2005] FCA 1121; (2005) 60 ATR 518, husband and wife trustees contravened ss 62 and 109(1) of the *SIS Act*. The wife had limited business experience and little involvement in the contraventions. The husband had considerable business experience and was centrally involved in the contraventions. The husband and wife caused a fund which had seventeen members (including themselves) to make a purchase of manufacturing dies from a company they controlled for a price ($165,870) which was far in excess of the market value. The purpose of the transaction was to obtain money for their own benefit. They paid $226,498 compensation including to the other fund members for the losses suffered. They paid $100,000 on trust for a possible pecuniary penalty. Their net asset position after these payments was around $370,000. Their combined annual income was $100,000.
2. The court imposed a penalty, as proposed by the parties, of $100,000 on the husband but nothing on the wife. Despite reservations about imposing an agreed penalty, Weinberg J did so because he was bound to do so by authority of the Full Court of the Federal Court. His Honour held that the penalty was not outside the permissible range although he may well have selected a higher figure.

### Vivian (DCOT (Superannuation)) v Fitzgeralds (2007)

1. In *Vivian (DCOT (Superannuation)) v Fitzgeralds* [2007] FCA 1602; (2007) 69 ATR 834, Logan J found that the respondents had contravened ss 62(1) and 65(2) of the *SIS Act* three times each. Mr and Mrs Fitzgeralds had sold a property that was owned by the superannuation fund and misapplied around $148,000 from the fund to settle a claim by a liquidator against them. Neither Mr nor Mrs Fitzgeralds had contravened the act previously. Each had an annual income of around $52,000 each. They had a mortgage of around $650,000, with repayments of around $4,000 per month.
2. Justice Logan imposed a penalty of $20,000 on Mr Fitzgeralds for his contraventions and $10,000 on Mrs Fitzgerald. The difference in penalty was because Logan J found that Mr Fitzgerald was the more culpable of the two trustees for the breach.

### Olesen v Eddy (2011)

1. In *Olesen v Eddy (In his Capacity as Deputy Commissioner of Taxation)* [2011] FCA 13; (2011) 81 ATR 763, Mansfield J found that the respondent had contravened ss 62(1) and 65(1) of the *SIS Act*. The respondent had made 130 separate and small transactions of withdrawing funds from the account for his own personal benefit and use between 21 September 2005 and 26 September 2008. The quantum of the respondent’s breaches was around $75,000. Justice Mansfield found that the respondent’s financial position was “just comfortable”, having a good income but many financial commitments such as mortgage payments, child support, and school fees.
2. A $15,000 penalty was agreed between the parties and imposed with weekly instalments.

### Olesen v MacLeod (2011)

1. In *Olesen (In his capacity as Deputy Commissioner of Taxation (Superannuation)) v MacLeod* [2011] FCA 229; (2011) 85 ATR 107, Mr MacLeod was a co-trustee and the only member of a superannuation fund. He contravened ss 62(1) and 65(1) of the *SIS Act* by making payments to himself from the superannuation fund totalling approximately $45,000 over three consecutive financial years. After further payments, the total of misapplied funds was around $60,000. It almost exhausted the whole of the superannuation fund.
2. After an audit in 2009, the Commissioner issued Mr MacLeod with an amended income tax return on the basis that the payments were by way of illegal early released of preserved superannuation benefits. But Mr MacLeod continued to make a $10,000 and then a $6,000 payment to himself. He made these payments due to stressful financial circumstances including a threat of legal action against him, the breakdown of his marriage, and the cost of his son’s school fees.
3. Mr MacLeod repaid about $3,500 to the fund in 2009. His financial position had improved since he misappropriated the funds, with his son no longer at school and having received an inheritance following the death of his father. However, no findings were made concerning his specific financial circumstances.
4. Justice Barker imposed a penalty of $12,500, which included a reduction of several thousand dollars for the respondent’s admissions and co-operation.

### Olesen v Parker (2011)

1. In *Olesen (In his Capacity as Deputy Commissioner of Taxation (Superannuation)) v Parker* [2011] FCA 1096; (2011) 85 ATR 387, the respondents were husband and wife sole trustees and members of a superannuation fund. They made loans from the fund to three companies associated with them. The loans were for $380,000, $115,000 (of which $107,700 was repaid), and $130,000. They also invested $160,000 in one company. The interest on the loans was sometimes capitalised and was sometimes not enforced. The husband and wife contravened ss 83(2), 84(1), 109(1A), and 62(1) of the *SIS Act*. The contraventions put at risk $372,670. Of that amount, $260,660 was not recovered.
2. Justice Gordon imposed a $35,000 penalty on the husband and $15,000 penalty on the wife. The husband obtained a higher penalty for his greater degree of responsibility for the contraventions than the wife. There were no findings about the particulars of the respondents’ financial circumstances.

### DCOT v Graham Family Superannuation (2014)

1. In *Deputy Commissioner of Taxation (Superannuation) v Graham Family Superannuation Pty Limited* [2014] FCA 1101, the respondents made eighty loans worth around $130,000 from the fund to themselves, and leased a property held by the fund to their son without collecting rent, contravening ss 62(1), 65, 84, and 109 of the *SIS Act.* The total value put at risk was $254,000. This amount was fully repaid. The respondents made early admissions and co-operated with the Commissioner.
2. Justice Buchanan imposed total, agreed, penalties of $30,000 on the second respondent and $10,000 on the third respondent. Justice Buchanan made no findings in relation to the respondents’ financial circumstances.

### DCOT v Lyons (2014)

1. In *Deputy Commissioner of Taxation v Lyons* [2014] FCA 1353, Mr Lyons was the trustee of the Lyons Family Superannuation Fund. He and his wife withdrew $190,000, which was almost the entirety of the fund using a system of back-to-back loans to a relative to obtain working capital for his business. The loans were a contravention of ss 62, 65, 84, and 109(1) of the *SIS Act*. The conduct occurred over six occasions over an eleven month period. Subsequently Mr and Mrs Lyons both became bankrupt. Although Mrs Lyons was a knowing participant in the breaches, the Commissioner did not commence proceedings against her.
2. Mr Lyons had no past record and was declared bankrupt several years before the proceedings were commenced. Mr Lyons made a submission that he was facing “extreme financial difficulties” at the time and Bennett J found that Mr Lyons did not have the financial capacity to rectify the breaches.
3. An agreed penalty of $32,500 was imposed.

### Olesen v Early Sunshine Pty Ltd (2015)

1. *Olesen v Early Sunshine Pty Ltd* [2015] FCA 12, is the most recent case. It involved an agreed penalty in relation to loans that were made by three directors of a corporate trustee of a superannuation fund to companies that were controlled by the directors. A total of approximately $550,000 in loans was made. The loans involved 71 contraventions over a five year period of deliberate infringing. They were a contravention of ss 62, 65, 84, and 109(1) of the *SIS Act*.
2. Typically the loans were outstanding for a relatively short period of time and repaid in full. Accordingly, the fund suffered no loss of capital. The directors co-operated fully with the Commissioner.
3. One director had a weekly income of around $2,200 before tax and week expenditure of around $1,215 (including income tax) with total liabilities of around $247,000. Another had a weekly income of around $3,400 before tax and weekly expenditure of around $1,700 with total liabilities of $376,000. The third director had a weekly income of around $2,900 before tax and weekly expenditure of $14,200 with liabilities of around $200,000.
4. Justice Foster imposed an agreed penalty of $13,000 on each of the individual directors.

## Consideration of penalty

1. My review of the cases below reveals that the general run of pecuniary penalties for a single individual who commits a series of related contraventions varies between $10,000 and $35,000. Nevertheless, some cases involve greater penalties and some involve lesser. In circumstances involving a penalty on two spouses the effect of an individual penalty can be doubled when imposed upon both spouses.
2. In written submissions for the Commission which were otherwise impeccable, there was a close focus upon the three most recent cases and an apparent suggestion that the contravention in this case is more serious than each of those cases so that penalties in this case should exceed those in each of the three most recent cases. In oral submissions, counsel for the Deputy Commissioner submitted that he had not meant to submit that the penalty must necessarily exceed those amounts. That submission is correct. It would be erroneous to submit that the penalty must exceed an amount in any of those cases for three reasons.
3. First, such a submission would ignore the fact that in *Lyons* and *Graham Family Superannuation* the penalties were agreed. The state of the current law in this Court, as set out in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 [238] by the Full Court, is that “where a penalty has been fixed in that way, the decision may not be treated as helpful in future cases, save to the extent that it indicates a position adopted by a regulator to which it should be held in later cases”.
4. Secondly, there are incomparables in some of the three cases that cannot be compared with this case. In *Graham* there was no finding about the financial circumstances of the respondents. The periods of time over which the infringing occurred were different. In *Early Sunshine* it was five years. In *Lyons* it was 11 months. Further, in none of those cases can there be any meaningful comparison of the extent of co-operation by the respondent with the Commissioner, or the degree to which the respondent is contrite. There were also different numbers of individuals involved. In *Sunshine* the total penalty of $39,000 was obtained by aggregating the penalty of the three directors. The $32,000 penalty in *Lyons* was imposed on Mr Lyons only.
5. Thirdly, and perhaps most fundamentally, it would be an error if the imposition of a pecuniary penalty proceeded by a direct one-to-one comparison between cases. Apart from considerations of parity that arise in very similar cases, the appropriate approach is to assess the general run of cases and synthesise where the instant case falls within that general run. Three cases is not a general run of cases. The discretionary judgment involved in assessing a pecuniary penalty requires all the relevant factors to be instinctively synthesised to arrive at a single result which takes due account of them all: *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, 374 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584, 611-612 [74]-[76] (Gaudron, Gummow and Hayne JJ).
6. As Mansfield J explained in *Olesen v Eddy*, 767 [18], one important consideration in the imposition of pecuniary penalties under s 196 of the *SIS Act* is general deterrence. In particular, those who take advantage of a self-managed superannuation fund have a responsibility to manage that fund in accordance with the terms of the Deed and the legislation and a civil penalty for contravention of that obligation needs to be sufficiently high to deter contravention by others, although not oppressive. Contravening conduct under the Act may be difficult to detect and its investigation can be complex and expensive.
7. Some of the other relevant factors that have been described in previous decisions include the following, as set out by Gordon J in *Olesen v Parker* [73]:
8. the nature and extent of the contravening conduct;
9. the amount of any loss or damage caused;
10. the size of the organisation;
11. the deliberateness or otherwise of the contravention(s);
12. the period over which the contravention(s) extended;
13. the degree of co-operation of the person concerned, either in the investigation or the subsequent hearing;
14. the past record of the person;
15. the person’s financial position;
16. any amounts already paid by way of compensation or legal costs;
17. contrition; and
18. any applicable public policy position.

### Maximum penalty

1. First, the maximum penalty for each contravention is 2,000 penalty units which, at the relevant time, was $220,000: see *SIS Act* s 196(3)and *Crimes Act 1914* (Cth)s 4AA. Although there were a number of contraventions in this case, the totality principle requires that the total penalty does not exceed what is proper for the conduct of the respondents in respect of all the contraventions. In circumstances in which the contraventions in this case were of a very similar nature, and were part of a continuing course of conduct involving the same facts and circumstances, it is appropriate for the purposes of the totality principle, to treat $220,000, for practical purposes, as the maximum penalty: *Australian Prudential Regulation Authority v Derstepanian* [31] (Weinberg J).

### Seriousness of the contraventions

1. The contravening conduct involved substantial sums of money. The total that was removed from the Fund was $209,677. The Fund is almost exhausted.

### Deliberate nature of the contraventions

1. When they made the withdrawals the Ryans knew and understood that they were contravening the *SIS Act*.

### Prior contraventions

1. There have been prior contraventions by the Ryans. Between October 2001 and February 2004, the Ryans made withdrawals from the Fund for their own benefit.
2. Following an Auditor’s Contravention Report, lodged by the auditor for the fund with the Commissioner of Taxation in April 2007, the Commissioner of Taxation conducted an audit of the Fund. On 11 December 2007, the Commissioner wrote to the Ryans alleging contraventions of ss 62, 65, and 109 of the *SIS Act.* The Commissioner invited the Ryans to give an enforceable undertaking under s 262A of the Act, to rectify the contraventions, including by repayment of the money withdrawn from the Fund with interest.
3. Mrs Ryan executed an enforceable undertaking to rectify the contraventions. On 23 June 2008, the Commissioner accepted that the undertaking had been complied with and the contraventions had been fully rectified.

### The Ryans’ financial position

1. The agreed facts descended into considerable detail about the Ryans’ financial position. The following are pertinent points.
2. The Ryans have capacity to pay a pecuniary penalty imposed by the Court. But despite a substantial employment income for Mr Ryan, their financial position is not strong.
3. The Ryans have around $950,000 in property assets which are three properties, two of which are described as “rental properties”. The total mortgage debt on the rental properties is $500,000 and the third property secures a line of credit for which they currently owe $332,000. Overall they have less than $70,000 equity in their properties.
4. Apart from their property ownership, they own 2 vehicles and have joint credit card debt of approximately $99,000.
5. Mr Ryan has employment income, including bonuses, of around $280,000 per annum and Mrs Ryan has income of approximately $27,000 per annum. The Ryans together receive rental income of around $20,000 per annum but this is considerably exceeded by the mortgage repayments and rental property expenses.
6. Mr Ryan also has an outstanding tax liability of $73,000. This is the reduced amount from around $91,000 after the Ryans have made a series of payments of this, usually in the amounts of $1,000.
7. The Ryans have substantial monthly outgoing expenses. These include $3,400 in mortgage repayments, $1,600 repayments on the line of credit, $2,000 in credit card repayments, $1,520 in rent and repayments of their tax liability. Even if their properties were sold, the monthly expenses would still be substantial.

### Co-operation with the Commissioner

1. The Ryans have fully co-operated with the Commissioner in relation to these proceedings. When the Deputy Commissioner filed a statement of claim, they admitted all facts. They agreed a statement of facts. They have not contested any of the Deputy Commissioner’s submissions.
2. I accept that the Ryans are extremely contrite. Nevertheless, they have not made any repayments to the Fund since 30 June 2010 although I take into account the numerous debt repayment obligations that they have to make.

## Conclusions and orders

1. Taking all the circumstances into account, I consider that the appropriate pecuniary penalty is $20,000 for each of Mr and Mrs Ryan (a combined total of $40,000). On the agreed facts, and admitted facts in the statement of claim, which are before the Court, I accept the submission of counsel for the Deputy Commissioner that Mr and Mrs Ryan should be treated as equally responsible. Their financial affairs were also treated as a unity.
2. In *Eddy,* Mansfield J held that the power to order a pecuniary penalty carries with it an implied consequential power enabling the Court to order periodic payments. Instalment payments were also ordered in *Lyons.* Counsel for the Deputy Commissioner relied upon the existence of this implied consequential power and Mr Ryan said that monthly instalments would be easier for him and Mrs Ryan to pay. In light of the approach taken in these authorities I will proceed on the basis that I have such a power. In light of the financial circumstances of Mr and Mrs Ryan, the penalties should be paid over 3 years with monthly repayments of $555.55 each.
3. The Deputy Commissioner also sought declarations of contravention. Section 196(2) of the *SIS Act* requires the Court to declare that a person has contravened the pecuniary penalty provision in relation to a specified superannuation entity, but need not so declare if a declaration is already in force. There is currently no declaration in force. The Fund is a specified superannuation entity.
4. The form of declaration proposed by Deputy Commissioner is appropriate.
5. The Deputy Commissioner sought orders for payment of costs. It is appropriate that the Ryans pay the Deputy Commissioner’s costs. Although the Deputy Commissioner sought a taxation of costs, if not agreed, it is appropriate in this case to fix the costs. I will hear from the Deputy Commissioner about the amount by which costs should be fixed.

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| I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman. |

Associate:

Dated: 18 September 2015