JUD/*2024*AATA2592 -

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Coronica and Commissioner of Taxation (Taxation) [2024] AATA 2592 (19 July 2024)

Division: TAXATION AND COMMERCIAL DIVISION

File Number(s): **2018/7159**

Re: **Giuseppe Coronica**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Senior Member G Lazanas**

Date: **19 July 2024**

Place: **Melbourne**

The decision under review is affirmed.

.....[**Sgd**].....

Senior Member G Lazanas

Catchwords

SUPERANNUATION – decision by Commissioner of Taxation to disqualify the applicant from acting as trustee of self-managed superannuation fund – multiple contraventions of the Superannuation (Industry) Supervision Act 1993 (SISA) established – nature and seriousness and number of contraventions – applicant not a fit and proper person – exercise of discretion - decision to disqualify applicant affirmed

Legislation

Administrative Appeals Tribunal Act 1975 (Cth), ss 2A, 25(4A), 33(1)
Superannuation Industry (Supervision) Act 1993 (Cth), ss 3, 4, 5, 6, 10, 17A, 34, 35A, 35AE, 40, 62, 65, 66, 70B, 70E, 71, 82, 83, 84, 126A, 193
Superannuation Industry (Supervision) Regulations 1994 (Cth), regs 4.09A, 13.22C, 13.22D

Cases

Aussiegolfa Pty Ltd v Commissioner of Taxation [2018] FCAFC122; 264 FCR 587
Blackman v Commissioner of Taxation [1993] FCA 345
Coronica and Commissioner of Taxation [2021] AATA 745
Coronica and Federal Commissioner of Taxation [2021] AATA 1225
Commissioner of Taxation v Coronica [2022] FCA 72
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409
Merchant and Commissioner of Taxation [2024] AATA 1102
Morales v Minister for Immigration and Multicultural Affairs [1998] FCA 334
MZZZW v Minister for Immigration [2015] FCAFC 133; (2015) 234 FCR 154
Re Fitzmaurice and Federal Commissioner of Taxation (2019) 110 ATR 440
Rich v Australian Securities and Investments Commissioner [2004] HCA 42; 220 CLR 129
WZWK and Commissioner of Taxation [2023] AATA 872

REASONS FOR DECISION

Senior Member G Lazanas

19 July 2024

INTRODUCTION

1. Mr Guiseppe Coronica seeks a review of the Commissioner's decision to disqualify him under ss 126A(1) and (3) of the *Superannuation Industry Supervision Act 1993* (Cth) (the ***SISA***) from acting as a trustee of a superannuation fund (the ***Disqualification Decision***).

2. The application with respect to the review of the Disqualification Decision was initially determined by the Tribunal constituted by Senior Member James (the ***Initial Tribunal***). The Tribunal's reasons for decision were given on 1 April 2021 (the ***Initial Tribunal Reasons***) and the orders were subsequently made by the Initial Tribunal on 11 May 2021. Broadly, Senior Member James decided to set aside the Disqualification Decision and, in place of that decision, to accept undertakings from Mr Coronica (the ***Initial AAT Disqualification Decision***): *Coronica and Commissioner of Taxation* [2021] AATA 745; *Coronica and Federal Commissioner of Taxation* [2021] AATA 1225.

3. The Commissioner appealed to the Federal Court from the Initial AAT Disqualification Decision (the ***Appeal***). On 7 February 2022, Justice Davies allowed the Appeal, setting aside the Initial AAT Disqualification Decision and remitting the matter to the Tribunal for determination according to law: *Commissioner of Taxation v Coronica* [2022] FCA 72. Mr Coronica argued that the Tribunal should arrive at the same conclusion as the Initial Tribunal and set aside the Disqualification Decision based on the same undertakings he previously proffered. Mr Coronica stated that the Disqualification Decision was an overreaction by the Commissioner and served no legitimate regulatory purpose in circumstances where he was not a future compliance risk, especially as he was only ever a trustee of his own self-managed superannuation fund (***SMSF***). Besides, he had extensive accounting and tax experience and an otherwise unblemished tax record.

4. As these reasons will explain, I have decided that the Disqualification Decision under review should be affirmed. Broadly, those reasons include the conclusions regarding the nature and seriousness of the contraventions, as well as the number of contraventions over a number of years, all arising directly from Mr Coronica's own decisions and actions. Additionally, I have reached the conclusion that Mr Coronica is not a fit and proper person to act as a trustee of a superannuation fund. Having been satisfied that the grounds for disqualification were made out, the Tribunal has exercised the discretion to affirm the

Disqualification Decision. The Tribunal considered the seriousness and recurrence of the past contraventions, as well as the risk of future non-compliance and the issue of general deterrence to be influential factors.

5. It is appropriate to record at the outset that this decision necessarily canvasses the Tribunal's procedure in the remittal hearing owing to the way it proceeded, followed by the factual and procedural background. This is then followed by the Tribunal's findings and analysis of the law relating to the Disqualification Decision. It is also appropriate to record upfront that the parties tendered an agreed Tribunal Remittal Bundle (***TRB***) comprising six folders of materials. The parties added materials to the TRB at the remittal hearing.

THE TRIBUNAL'S PROCEDURE IN THE REMITTAL HEARING

6. It is well established that, on remittal, according to law and any directions of the Federal Court, the Tribunal must undertake the task of review again: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 (Bowen CJ and Deane J); *Morales v Minister for Immigration and Multicultural Affairs* [1998] FCA 334 (Black CJ, Burchett and Tamberlin JJ). The Tribunal is not bound by the findings made by the Initial Tribunal and must exercise its own independent judgment to ascertain the facts necessary for the making of the decision: *Blackman v Commissioner of Taxation* [1993] FCA 345 [14] (per Gray J, Keely J agreeing); and *MZZZW v Minister for Immigration* [2015] FCAFC 133; (2015) 234 FCR 154 at 171 [60] (Tracey, Murhpy and Mortimer JJ).

7. The general principle was set out in *Blackman v Commissioner of Taxation* [1993] FCA 345; (1993) 43 FCR 449 at 455 – 456, where Gray J stated:

> *The obligation of the Tribunal to find facts is not diminished where there has been a successful appeal to the Federal Court of Australia under s 44 of the Administrative Appeals Tribunal Act. If the Court allows the appeal, sets aside the decision of the Tribunal, and remits the case to be heard and decided again, the Tribunal retains its responsibility to find the facts. If, as is usually the case, the remitted matter is heard and decided by a Tribunal differently constituted from the Tribunal whose decision was the subject of the successful appeal, the differently constituted Tribunal will have to find facts. In the exercise of its powers, and subject to the submissions of the parties, the Tribunal may decide to act on the findings of fact made by the earlier Tribunal, or some of them. It may decide, as the learned senior member did in the present case, to rely upon evidence which was before the earlier Tribunal. It may decide that the proper course is to receive all or some evidence afresh. The parties might agree that some or all of the findings of fact previously made are to be treated as findings of fact by the Tribunal. … The course which the Tribunal takes in relation to any case will*

depend on the circumstances of that case, but it will be the responsibility of the Tribunal which ultimately decides the case to determine for itself the facts.

8. Additionally, the Tribunal has a discretion as to the manner in which the review should proceed by virtue of ss 25(4A) and 33(1)(a) and (b) of the *Administrative Appeals Tribunal Act* 1975 (Cth) (the ***AAT Act***). Section 25(4A) of the AAT Act states that "the Tribunal may determine the scope of the review of a decision by limiting the questions of fact, the evidence and the issues that it considers." In accordance with paragraphs (a) and (b) of 33(1) of the AAT Act, "the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal" and proceedings are to be "conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act … and a proper consideration of the matters before the Tribunal permit".

9. Moreover, the Tribunal's discretion is informed by its statutory objectives, which are set out in s 2A of the AAT Act, and require the Tribunal, in carrying out its functions, to provide a mechanism of review that is, "fair, just, economical, informal, and quick".

10. The Commissioner urged me to review the evidence relied on by the Initial Tribunal (by reference to the TRB) in reaching its findings and to adopt those findings. In his submissions dated 24 July 2023, Mr Coronica stated (at paragraph [12]): "[t]he Tribunal can safely reach the same conclusion as [the Initial Tribunal] …. No matter of fact has changed since that hearing. The Tribunal will hear the very same evidence."

11. Against the above background, the remittal hearing was conducted on the basis that the Tribunal would review the TRB which included the transcripts of the Initial Hearing as well as consider the further evidence and submissions provided at the remittal hearing. The Tribunal would also consider and review the findings made by the Initial Tribunal and adopt them, as appropriate. The Tribunal pursued this approach after careful consideration of the respective positions of the parties, the requirement for the Tribunal to make its decision afresh as at the date of the remittal hearing, and the fact that the Tribunal has a discretion as to the manner in which the review should proceed.

12. The following relevant matters were also influential. *First,* Justice Davies remitted the matter to be determined according to law, without any direction. At Mr Coronica's request, the Tribunal allowed Mr Coronica to provide further evidence, including documents

regarding more recent events to show Mr Coronica's co-operation with the Commissioner. *Secondly, a*t the hearing before the Initial Tribunal which ran for five days (the ***Initial AAT Hearing***), Mr Coronica was represented by counsel and an instructing solicitor. As stated above, the transcripts of the Initial AAT Hearing were provided to the Tribunal for consideration together with multiple written submissions. Mr Coronica then represented himself at the remittal hearing which ran for four days. He exuded confidence in advocating for himself and stated he was unconstrained in giving further evidence.

13. *Thirdly,* the Initial AAT Hearing concerned the review of two decisions, namely, a decision by the Commissioner about the non-compliance of Mr Coronica's SMSF (the ***Non-Compliance Decision***) and, secondly, the Disqualification Decision. Mr Coronica did not appeal the Non-Compliance Decision. Significantly, neither party in the Appeal challenged any of the findings made by the Initial Tribunal including findings about contraventions that were relevant to the Disqualification Decision.

14. *Fourthly*, the Initial Tribunal affirmed the Non-Compliance Decision which concerned the issue of a notice of non-compliance to Mr Coronica's SMSF - the G Coronica Superannuation Fund (the ***Fund***) - under s 40(1) of the SISA. Broadly, the Initial Tribunal concluded that Mr Coronica, as a trustee of the Fund had contravened the regulatory obligations under the SISA on at least 12 occasions in the 2009 income year and on at least a further 14 occasions in the 2010 to 2014 income years. Significantly, the subject matter in terms of the contraventions was common to both proceedings before the Initial Tribunal (see [13] above) and the parties relied on the same analysis and submissions undertaken in relation to the contraventions at the Initial Hearing at the remittal hearing. In particular, the Commissioner had prepared and relied on a summary document that was before the Initial Tribunal (the ***Contraventions Summary***). The Commissioner updated the Contraventions Summary for the remittal hearing, including to show alleged contraventions that were no longer pressed by the Commissioner, as well as to reference the Initial Tribunal's findings and conclusions. Mr Coronica agreed that the Contraventions Summary was a useful framework for the review of the Disqualification Decision at the remittal hearing. The Tribunal did not, however, consider it necessary, in all the circumstances of how the remittal hearing proceeded, to review each of the alleged contraventions.

THE ISSUE BEFORE THE TRIBUNAL

15. The essential issue in this proceeding is whether the Commissioner's decision to disqualify Mr Coronica under ss 126A(1) and (3) of the SISA was the correct or preferable decision.

THE RELEVANT STATUTORY PROVISIONS AND PRINCIPLES

16. It is necessary to first set out some key provisions of the SISA relating to the Commissioner's disqualification power. The specific provisions relevant to the alleged contraventions of the SISA are set out further below when considering the contraventions of the SISA.

Provisions relating to disqualification under sections 126A(1) and (3) of SISA

17. Section 126A is contained in Part 15 of the SISA, which prescribes, relevantly, standards for trustees of superannuation entities. Section 126A(1) relevantly states:

> *(1) The Regulator may disqualify an individual if satisfied that:*
>
> > *(a) the person has contravened this Act or … on one or more occasions; and*
> >
> > *(b) the nature or seriousness of the contravention or contraventions, or the number of contraventions, provides grounds for disqualifying the individual.*

18. Section 126A(3) states:

> *(3) The Regulator may disqualify an individual if satisfied that the individual is otherwise not a fit and proper person to be a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian.*

19. Disqualification takes effect on the day on which it is made: s 126A(4). Acting as trustee when disqualified is a strict liability offence attracting a penalty of 60 penalty units, and a criminal offence attracting imprisonment of 2 years: s 126K of the SISA.

The legal principles

20. The nature of the power conferred by ss 126A(1) and (3) of the SISA was examined in the Appeal which provides precise guidance for the determination of the issue. Justice Davies held at [15] in the Appeal:

> *15 The statutory questions (whether the nature, number and/or seriousness of the contraventions provides grounds for disqualifying the individual (s 126A(1)); and whether the person is otherwise not was a fit and proper person to be a trustee (sic) (s 126A(3))) arise from the express terms of the provisions themselves, which make the formation of the state of satisfaction of those matters a precondition to the exercise of the statutory power to disqualify a person from acting as trustee of a superannuation fund. As the exercise of the power under either provision turns on satisfaction of the matters prescribed, it is a mandatory step for the regulator (here the Tribunal standing in the shoes of the Commissioner) to consider whether to form the required states of satisfaction as a statutory condition for the exercise of discretion. As the decision whether to reach the requisite state of satisfaction is a mandatory step, the formation of that state of satisfaction is not only a jurisdictional fact, but it is also a matter that affects the exercise of the discretion having regard to the subject matter, scope and purpose of the power. In the absence of the formation of the requisite states of satisfaction, or if there are errors in the process by which those states of satisfaction were reached, the exercise of the discretion under s 126A will have miscarried: Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; 244 CLR 144, [57] (French CJ); Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21; 197 CLR 611, [130]-[137] (Gummow J); Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 [2003] HCA 30; 73 ALD 1, [59] (McHugh and Gummow JJ).*

21. In summary, the Tribunal must consider, and form a state of satisfaction, in respect of the relevant matters *before* considering whether to exercise the residual discretion to disqualify a person under ss 126A(1) and/or (3) (Appeal [20]). Moreover, the degree of satisfaction held by the Tribunal in respect of each of those matters is relevant to, and will inform, the exercise of the residual discretion to disqualify.

22. It is important to note that the Initial Tribunal incorrectly concluded that the Disqualification Decision should be set aside primarily because, as a member of the Fund, Mr Coronica suffered significant financial consequences from the Non-Compliance Decision, and those consequences met the "sentencing objectives" identified by High Court in *Rich v Australian Securities and Investments Commissioner* [2004] HCA 42; 220 CLR 129: see Initial Tribunal Reasons [343]. The Initial Tribunal was content to rely on undertakings proffered by Mr Coronica. Those undertakings included, amongst other things, that Mr Coronica would not act as a trustee of any superannuation fund other than his own fund in

respect of which Mr Coronica was required to become and remain the sole member; all financial activities of his fund would be transacted through that fund's bank account rather than those of its member and/or related parties; and the fund would appoint and continue to engage an independent accountant, tax agent and auditor to prepare the appropriate accounts, returns and reports: *Coronica and Commissioner of Taxation* [2021] AATA 1225. It will be necessary to briefly return to the undertakings below, as Mr Coronica was still prepared to give the undertakings that the Initial Tribunal had accepted.

23. In the Appeal, Justice Davies rejected the Initial Tribunal's reasoning that the financial consequences of the Fund becoming non-complying amounted to a "monetary impost in the nature of a penalty on Mr Coronica" (Appeal [22]). Her Honour also stated that consequence was a separate and independent sanction imposed on the Fund under the SISA. Her Honour held at [22]:

> *The [Initial] Tribunal also fell into error by characterising the financial consequences for the Fund becoming a non-complying fund as a monetary impost in the nature of a penalty on Mr Coronica. That characterisation is wrong……The scheme of the SIS Act contemplates that multiple sanctions may be both appropriate, and the sanction of a disqualification order is different from the sanction of giving a fund a notice of non- compliance. The sanction of a disqualification order causes the person against whom it is made to forfeit the office of trustee and forbids that person from acting as a trustee of a superannuation fund. That consequence is inflicted on the person because that person is not a fit and proper person to act as trustee: Rich v ASIC, [37]. The Tribunal, by focussing on the resultant financial consequences from the change of status of the Fund, did not give appropriate consideration to the question of whether Mr Coronica is a fit and proper person to continue to act as a trustee and thereby misdirected itself about the factors relevant to, and bearing upon, whether to impose the sanction of disqualification on Mr Coronica.*

THE FACTUAL AND PROCEDURAL BACKGROUND

24. The following findings of fact are based on the approach set out at [11]-[14] above. The facts were not in dispute, although Mr Coronica still caviled with the conclusions to be drawn from them, namely, whether all the alleged contraventions were established. The facts are drawn from the evidence of Mr Coronica and from the various Statements of Facts, Issues and Contentions filed with the Tribunal. Mr Coronica was the only person who gave written and oral evidence before the Initial Tribunal and at the remittal hearing.

Mr Coronica and the accountancy practice

25. Mr Coronica is an accountant and tax agent with over 50 years' experience having started his own accounting practice, initially as a sole trader, in 1970. Mr Coronica provides accountancy and tax agent services as an employee of G. Coronica Pty Ltd which was incorporated in 1974 and which runs an accountancy practice trading as G. Coronica & Associates. Mr Coronica is a Fellow of the CPA Australia. Mr Coronica also has some valuation experience, including having been engaged by an insolvency firm to perform an investigation into the financial reporting and asset valuations of Timbercorp Ltd when it went into administration.

26. Prior to 20 November 2018, G. Coronica Pty Ltd had two directors being Mr Coronica and Ms Yvonne Price who worked for Mr Coronica as his personal assistant for 45 years. Prior to 20 November 2018, Mr Coronica held 7,499 out of a total number of 7,500 shares on issue, and Ms Price held 1 share. Mr Coronica is now the sole director of G. Coronica Pty Ltd and is the owner of all of its issued shares.

The Fund

27. The G Coronica Superannuation Fund (the ***Fund***) is a self-managed superannuation fund within the meaning of s 17A(1) of the SISA. The Fund was established on 16 May 1975 and its current trust deed was executed on 21 November 1994.

28. Mr Coronica is now the sole trustee of the Fund. At all relevant times, the trustees of the Fund were Mr Coronica and Ms Price. Mr Coronica was the active trustee and on Mr Coronica's evidence, Ms Price took a passive role. Mr Coronica has never been a trustee of any other superannuation fund.

29. At all relevant times, Mr Coronica has been the sole member of the Fund who has had an account balance. Ms Price became a member of the Fund in the 2011 income year, but her account balance was always nil.

30. The Fund has been in pension phase since 1 July 2016 and commenced paying a pension to Mr Coronica at that time.

31. The Fund's SMSF annual income tax returns for the 2008 to 2014 income years were prepared and lodged by Mr Coronica.

32. Mr Coronica was appointed as the approved auditor for the Fund for the 2000 to 2007 income years. The Fund was audited by approved SMSF auditor Ms Chantelle Mansour (being Mr Coronica's daughter) for the 2010 to 2012 income years. In the 2013 and 2014 income years, the Fund was audited by approved SMSF auditor Mr Simon McCormack.

The Fund's bank account

33. During the 2009 to 2014 income years (when the alleged contraventions occurred that are the subject of the Disqualification Decision), the Fund held a Direct Investment Account with the Commonwealth Bank of Australia (the ***Fund CBA Account***). This bank account was linked to the Fund's share trading account as the Fund principally invested in listed shares and used funds from the Fund CBA Account to pay for share purchases. Dividends and proceeds from the sale of listed shares were similarly paid into the Fund CBA Account.

The Fund's "suspense account"

34. The Fund also maintained what Mr Coronica described as a "suspense account" in respect of his dealings with the Fund, including to receive his concessional and non-concessional contributions. Mr Coronica testified that when he transferred assets into the Fund or when he paid expenses incurred by the Fund from his personal funds, he recorded such amounts as an acquisition from him in the suspense account. He stated that the Fund would then pay him for those assets and expenses using cash from the Fund CBA Account or by directing third parties who owed the Fund money, to pay him instead. Mr Coronica stated that he recorded these payments by the Fund to him as repayments in the suspense account.

35. Mr Coronica also claimed that on a regular or yearly basis, he would work out the balance of the suspense account and if he had given the Fund more than it had paid him, the balance was treated as his contribution to the Fund for that income year.

The Company

36. In 1999, Mr Coronica acquired all of the 100 ordinary shares in G. Coronica Nominees Pty Ltd (the ***Company***) in consideration of $100. Mr Coronica has been the sole director of the Company since 5 May 2004. Mr Coronica transferred his shares in the Company (the ***Company Shares***) to the Fund on or around 7 April 2009. As will become clear, that acquisition by the Fund is the subject of numerous alleged contraventions of the SISA.

37. The Company's income tax returns for the 2004 to 2014 income years and its financial statements for the 2009 and 2011 to 2014 income years disclose that the Company's main business activity was investments, including the acquisition of listed shares.

38. The Company had reported dividends and retained profits, as follows:

Income year	Company's taxable income	Dividends paid	Unappropriated profits reported	Capital reserves
2004	$15,954	$0	Unknown	Unknown
2005	$66,757	$0	Unknown	Unknown
2006	$369,241	$0	Unknown	Unknown
2007	$447	$0	Unknown	Unknown
2008	$34,780	$0	$387,503	$0
2009	$32,380	$35,000	$193,519	$0
2010	$20,161	$35,000	$354,282	$0
2011	$6,609	$35,000	$258,970	$0
2012	$4,849	$35,000	$235,676	$0
2013	$(13,867)	$35,000	$197,060	$(112,840)
2014	$(9,337)	$35,000	Unknown	Unknown

39. As of 30 June 2009, the Company had an estimated franking credit account balance of $175,786.17.

40. On or around 1 July 2008, the Company and Mr Coronica entered into a Division 7A excluded loan agreement and loan facility agreement for income tax purposes (the ***Div 7A Excluded Loan***). Relevantly, the balance of the loan outstanding as of 30 June 2009 was $174,803.13.

The Commissioner's role and the audit of the Fund

41. The Commissioner is a regulator within the meaning of the SISA and is responsible for the administration of the SISA and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (the ***SIS Regulations***) to the extent that they apply to SMSFs.

42. On 9 June 2016, the Commissioner relevantly advised the trustees of the Fund of an audit of the Fund and its associated entities for the 2011 to 2014 income years.

43. Between 12 September and 11 December 2017, the Commissioner issued various income tax and superannuation position papers in respect of the Fund and Mr Coronica.

44. On 5 September 2018, the Commissioner advised Mr Coronica and the trustees of the Fund of the conclusion of the audit and provided detailed reasons for his decision. In summary, the Commissioner advised:

    (a) the Fund of the Commissioner's decision to issue it with a notice of non-compliance under s 40(1) of the SISA for the 2009 income year (referred to as the Non-Compliance Decision - see [13] above); and

    (b) Mr Coronica of the Commissioner's decision to disqualify Mr Coronica from acting as a trustee of a SMSF under ss 126A(1) and (3) of the SISA (referred to as the Disqualification Decision - see [1] above).

45. On 25 September 2018, Mr Coronica requested a review of both the Non-Compliance Decision and the Disqualification Decision.

46. On 23 November 2018, the Commissioner advised Mr Coronica of the completion of the review. Relevantly, the Commissioner confirmed the decision to disqualify Mr Coronica.

The legal proceedings regarding the Disqualification Decision

47. On 11 December 2018, Mr Coronica applied for review by the Tribunal of the Disqualification Decision (as well as the Non-Compliance Decision).

48. As stated above, the Initial Tribunal Reasons which dealt with both the Non-Compliance Decision and the Disqualification Decision were published on 1 April 2021. The Appeal concerned only the Disqualification Decision and was decided on 7 February 2022. The remittal hearing by the Tribunal in relation to the Disqualification Decision took place between 29 January and 1 February 2024.

49. On 16 May 2024, after the Tribunal reserved its decision on the remittal hearing, the Tribunal handed down its decision in *Merchant and Commissioner of Taxation* [2024] AATA 1102 (the ***Merchant AAT Decision***). Deputy President Justice Thawley set aside the Commissioner's decision to disqualify Mr Merchant under s 126A(2) of the SISA and, in lieu, accepted undertakings from Mr Merchant. Consequently, Mr Coronica applied to re-open this proceeding. As the Commissioner was also prepared to make written submissions in relation to the application of the Merchant AAT Decision, the Tribunal received final written submissions from both parties in early June 2024. The respective submissions of the parties in relation to the Merchant AAT Decision are examined further below.

50. It is appropriate at this juncture to address the key alleged contraventions of the SISA.

THE CONTRAVENTIONS

51. Many of the alleged contraventions relate to the Fund's acquisition of the Company Shares in the 2009 income year, as referenced above. However, there were also a number of alleged contraventions in relation to operational matters of the Fund throughout the 2010 to 2014 income years. As will be evident from the analysis, the failure by the trustees of the Fund to address contraventions when they occurred invariably led to the contraventions spilling over into subsequent years and repeating.

52. It is convenient to set out the relevant legislative provisions concerning the alleged contraventions together with the findings and conclusions, including the relevant finding in the Initial Tribunal Reasons, before addressing the discrete issue for determination by the Tribunal.

Section 66(1) – prohibition re acquisition of certain assets from a fund's members

53. Section 66(1) of the SISA states as follows:

> *Prohibition*
>
> *(1) Subject to subsection (2), a trustee or an investment manager of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund.*

54. "Related party" is defined in s 10(1) of the SISA to include a member of the fund. Section 66(2) of the SISA exempts from the operation of s 66(1), among other matters, listed securities acquired at market value. Section 66(2A) of the SISA creates a further exemption where, relevantly, the asset acquired is an in-house asset of the fund under s 71(1) of the SISA and the asset is acquired at market value and the acquisition does not result in the fund exceeding the level of in-house assets permitted by Part 8 of the SISA.

55. Section 10(1) of the SISA relevantly defines "market value" to mean:

> *… the amount that a willing buyer of the asset could reasonably be expected to pay to acquire the asset from a willing seller if the following assumptions were made:*
>
> *(a) that the buyer and the seller dealt with each other at arm's length in relation to the sale;*
>
> *(b) that the sale occurred after properly marketing of the asset;*
>
> *(c) that the buyer and the seller acted knowledgeably and prudentially in relation to the sale.*

56. A contravention of s 66(1) of the SISA is an offence punishable on conviction by imprisonment for a term not exceeding 1 year.

57. As stated above, on around 7 April 2009, Mr Coronica transferred his Company Shares to the Fund in consideration for $100,000. The "payment" was recorded by way of journal entry in the Fund's "suspense account".

58. Significantly, Mr Coronica advised the Commissioner that he valued the Company Shares as at the transfer date at $100,000 on the basis of the following analysis:

Assets	**Historical cost**	**Revalued cost at 7/04/2009**	**Workings**
Futuris Corporation/Elders	$80,000	$22,000	
Other ASX listed shares	$124,000	$20,000	
Cash	$221	$221	
Unsecured loan (to Mr Coronica)	$175,000	$70,000 (discounted by 60%) $105,000 (discounted by 40%)	
Total value of assets		$112,221 (60% loan discount) $147,221 (40% loan discount)	
Tax liability valuation			
Unappropriated profits			$410,169
Capital and other losses excluding loan			$162,000
Profits available for distribution			$248,169
Tax liability = 45% marginal - 30% Company tax = 15%		$37,225	
Valuation			
Lower amount		$74,996	$112,221 – $37,225

Higher amount		$109,996	$147,221 – $37,225
VALUATION ADOPTED		**$100,000**	

59. As evident from the above table, the valuation methodology incorporated a significant discount in the value of the Division 7A Excluded Loan to Mr Coronica (see [40] above). The valuation did not take into account the retained earnings of the Company or its available franking credits (see [38]-[39] above). Subsequently, the Fund's financial statements for the 2009 to 2013 income years recorded the investment in the Company at cost price.

60. Following the transfer of the Company Shares, the Company then declared fully franked dividends to the Fund, as follows:

Income year	Franked dividends	Franking credits	Date
2009	$35,000.00	$15,000.00	-
2010	$35,000.00	$15,000.00	-
2011	$35,000.00	$15,000.00	28 June 2011
2012	$35,000.00	$15,000.00	26 June 2012
2013	$35,000.00	$15,000.00	27 June 2013
2014	$35,000.00	$15,000.00	26 June 2014

61. The dividends were recorded in journal entries in the Fund's "suspense account". As set out at [38] above, the Company had not paid dividends in prior years when it was owned by Mr Coronica.

62. It is indisputable that the Fund's acquisition of the Company Shares from Mr Coronica contravened s 66(1) of the SISA because Mr Coronica was a "related party" of the Fund and the acquisition was intentional. None of the relevant exceptions applied as the Company Shares were not listed securities (per s 66(2)). Furthermore, the Company

Shares were in-house assets of the Fund in respect of which no relevant exceptions applied including s 66(2A) (see further below regarding the law on in-house assets).

63. The Tribunal finds that the market value of the Company Shares was significantly higher than the consideration paid by the Fund to Mr Coronica. In reaching this finding the Tribunal has taken into account the fact there was minimal, if any, risk associated with the Division 7A Excluded Loan to Mr Coronica. Therefore, the large discounts applied by Mr Coronica in his valuation of the unsecured loan from the Company to himself (see [58] above) had no proper foundation. Moreover, the Company's net asset position was $193,619 for the 2009 income year and the Company's available franking account balance was $175,786.

64. Accordingly, the Tribunal finds that the market value of the Company Shares would have been significantly more than $100,000. This is because if the parties were dealing at arm's length with each other in relation to the sale of the asset, and the sale occurred after properly marketing the asset and in circumstances where the parties acted knowledgeably and prudently in relation to the sale (see [55] above), they would have negotiated a significantly higher price. On any view, the valuation approach adopted by Mr Coronica with respect to the discounts for the tax adjustment and the loan adjustment, does not withstand scrutiny. See also the Initial Tribunal Reasons at [82]–[86], [107] and [111] which are adopted. Nor was Mr Coronica justified in relying on Accounting Standard AASB 1033 titled 'Presentation and Disclosure of Financial Instruments' for the reasons summarised in the Initial Tribunal Reasons at [104], namely, it was irrelevant.

65. Adopting the net asset position of the Company ($193,619) as the market value of the Company Shares - which is apt in all the circumstances - the market value as a percentage of the market value of the Fund's total assets ($2,009,256) was 9.63%. Therefore, the Tribunal finds the acquisition of the Company Shares caused the Fund to exceed the prescribed market value ratio of 5% limit of in-house assets (see further below in relation to the discussion of in-house assets).

66. The Tribunal further finds that, although Mr Coronica had some valuation experience and was a very experienced accountant and tax agent, the valuation undertaken by him of the Company Shares was deficient. It can be inferred from all of the circumstances that Mr Coronica was taking advantage of his position to game the system. He was reducing his

personal tax liability and at the same time providing a benefit to the Fund which would accrue to him in the future. The Tribunal's conclusion is coherent with the conclusions set out in the Initial Tribunal Reasons which are applicable and adopted as summarised in [127] of the Initial Tribunal Reasons.

Section 65(1) – lending to members of regulated superannuation fund prohibited

67. Section 65(1) states as follows:

> *Prohibition*
>
> *(1) A trustee or an investment manager of a regulated superannuation fund must not:*
>
> *(a) lend money of the fund to:*
>
> *(i) a member of the fund; or*
>
> *(ii) a relative of a member of the fund; or*
>
> *(b) give any other financial assistance using the resources of the fund to:*
>
> *(i) a member of the fund; or*
>
> *(ii) a relative of a member of the fund.*

68. There are a couple of exceptions to the above prohibition, but none relevantly applied, for the reasons stated below. Broadly, the prohibition is strictly applied even where the loan is repaid shortly after the advance of any funds: *Re Fitzmaurice and Federal Commissioner of Taxation* (2019) 110 ATR 440 at [42].

69. There is no doubt that s 65(1) of the SISA was contravened by the Fund as, at the commencement of the 2009 income year, Mr Coronica was indebted to the Fund in the amount of $248,842.50 (the ***2009 Member Loan***). The 2009 Member Loan plus a further advance of $150,000, as well as further proceeds from the sale of the Fund's livestock that were all banked in Mr Coronica's personal account were all loans, as defined in s 10(1) of the SISA. This is because it is widely defined to include the provision of credit or any other form of financial accommodation, whether or not enforceable.

70. In his evidence before the Initial Hearing, Mr Coronica admitted he was aware s 65 of the SISA prohibited loans to members. Mr Coronica accepted the existence of the loans, the fact that they remained in place for several months, were unsecured and interest-free. He also acknowledged they were not recorded until accounts for the Fund were prepared many months after the end of the financial year. The Initial Tribunal Reasons recorded the

fact that, besides the contravention of s 65(1), there were also at least three contraventions of s 83(2) of the SISA owing to the subsequent acquisition of the Company Shares by the Fund. That provision states that where the market value ratio of the Fund's in-house assets exceeds 5%, a trustee of the Fund must not acquire an in-house asset. See also the Initial Tribunal Reasons at [128]-[136] and [208]-[214] which are applicable and adopted by the Tribunal in relation to the establishment of contraventions of ss 65(1) and 83(2).

Section 84(1) – in-house asset rules must be complied with

71. Each trustee of a regulated superannuation fund must take all reasonable steps to ensure that the fund complies with the in-house assets rules: s 84(1) of SISA. Section 84(1) is a civil penalty provision as defined by s 193, and Part 21 of SISA provides for civil and criminal consequences of contravening or of being involved in such a contravention.

72. The basic meaning of "in-house asset" of a superannuation fund is an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, amongst other things: s 71(1). The in-house asset rules in Part 8 of the SISA limit the proportion of "in-house assets" that a regulated superannuation fund may acquire to no more than a market value ratio of 5%: s 83 of the SISA. If the market value ratio of a fund's in-house assets exceeds 5%, a trustee must not acquire an in-house asset: s 83(2) of the SISA. If the ratio is below 5%, a trustee is prohibited from acquiring an in-house asset if the acquisition would result in the fund's in-house assets exceeding 5%: s 83(3) of the SISA.

73. Additionally, if the 5% market value ratio limit is breached, the trustee must make a written plan and ensure the steps in the plan are carried out to reduce the level of the fund's in-house assets to a market value ratio of 5% or below before the end of the following year of income: s 82.

74. Section 82 is prescriptive, as set out below:

> *(1) This section applies to a regulated superannuation fund.*
> *(2) If the market value ratio of the fund's in-house assets as at the end of:*
> *(a) the fund's 2000 - 2001 year of income; or*
> *(b) a later year of income;*

exceeds 5%, the trustee of the fund, or, if the fund has a group of individual trustees, the trustees of the fund, must prepare a written plan.

(3) The plan must specify the amount (the ***excess amount****) worked out using the formula:*

$$\left[\begin{array}{c}\text{Market value ratio of fund's}\\ \text{in-house assets as at the end of}\\ \text{that year of income}\end{array} - 5\%\right] \times \begin{array}{c}\text{Value of fund's}\\ \text{assets as at the end of that}\\ \text{year of income}\end{array}$$

(4) The plan must set out the steps which the trustee proposes, or, if the fund has a group of individual trustees, the trustees propose, to take in order to ensure that:

(a) one or more of the fund's in - house assets held at the end of that year of income are disposed of during the next following year of income; and

(b) the value of the assets so disposed of is equal to or more than the excess amount.

(5) The plan must be prepared before the end of the next following year of income.

(6) Each trustee of the fund must ensure that the steps in the plan are carried out.

75. There are further provisions which must be analysed in relation to the alleged contravention relating to the in-house asset rules. This is because s 71(1) of the SISA provides that the "basic meaning" of an "in house asset of a superannuation fund" includes "…. an investment in, a related party of the fund". Section 10(1) of the SISA defines "related party" to include, relevantly, a member of the fund or a "Part 8 associate" of a member of the fund. Paragraph 70B(f) of the SISA defines "Part 8 associates" of an individual to include, relevantly, a company that is sufficiently influenced by that individual, or in which that individual holds a controlling interest.

76. Furthermore, Division 13.3A of the SIS Regulations effectively modifies the basic meaning of in-house asset in s 71(1), by allowing a SMSF to hold an investment in, relevantly, a related company without such a holding being an in-house asset of the fund, provided that the company meets the conditions prescribed by the SIS Regulations. The relevant condition, found in reg 13.22C(f) – which Mr Coronica had sought to argue - is that the company does not hold an interest in, or maintain a loan to, another entity at the time the asset is acquired. Further, under reg 13.22D(b), the exemption provided by reg 13.22C will no longer apply if, relevantly, after the fund's investment in the company, the company commences to hold an interest in, or maintain a loan to, another entity. The SIS Regulations thereby ensure that the company does not engage in the activities which would be prohibited if undertaken directly by the fund.

77. The 2009 Member Loan was an in-house asset, which in its own right, as accepted by Mr Coronica, caused the Fund to breach s 84(1). As stated above, the Fund acquired the Company Shares on or about 7 April 2009 when the Fund's in-house assets exceeded the 5% cap. The Commissioner contended that the acquisition by the Fund of the Company Shares in the 2009 income year contravened s 84(1) of the SISA because:

(a) as at the date of the acquisition of the Company Shares on about 7 April 2009, Mr Coronica controlled (as sole director), and held a controlling interest in (as sole shareholder), the Company, and accordingly, the Company was a "Part 8 associate" of Mr Coronica;

(b) the Company Shares were in-house assets of the Fund;

(c) Regulation 13.22C did not exclude the Company Shares from the operation of the basic meaning of in-house asset in s 71(1) of the SISA because, at the time of the acquisition of the Company Shares, the Company maintained amongst other investments, the Division 7A Excluded Loan to Mr Coronica;

(d) the acquisition of the Company Shares caused the Fund to exceed the prescribed limit of in-house assets; and

(e) the trustees took no steps to dispose of the excess in-house assets before the end of the next following year of income, being the 2010 income year.

78. Mr Coronica had a different perspective which involved novel arguments and interpretations but it is unnecessary to canvas these again. It suffices to note that the Tribunal adopts the findings and conclusion set out in the Initial Tribunal Reasons at [54]-[68]. In particular, "Mr Coronica's interpretation of Regulation 13.22C to the facts and circumstances of the acquisition of [the Company Shares] were confused and demonstrated a lack of thoroughness, if not competence, for an accountant with his experience". Accordingly, the Tribunal finds that the Fund contravened s 84(1) of the SISA.

Further section 84(1) contraventions – investments in related trusts

79. The Commissioner contended that Mr Coronica further breached the in-house asset rules by investing in trusts over certain mortgage loans in the 2012 and 2014 income years.

80. During the 2012 to 2014 income years, the Fund reported various loans secured by mortgages (the ***Mortgage Loans***) as "sundry other investments" as follows:

2012	
Mortgage loans	
Mr and Mrs Millwood	$585,000.00
Mr and Mrs Davis	$525,000.00
Total	**$1,110,000.00**
2013	
Mortgage loans	
Mr and Mrs Millwood	$585,000.00
Mr and Mrs Davis	$525,000.00
Total	**$1,110,000.00**
2014	
Mortgage loans	
Ms Rigoli	$270,000.00
Mr and Mrs Millwood	$585,000.00
Mr and Mrs Davis	$525,000.00
Total	**$1,380,000.00**

81. Mr Coronica advised the Commissioner that there were no relevant relationships and that each transaction was "strictly business with security".

82. Mr Coronica was registered as the owner of a property at Sartoris Road, King Island in Tasmania (the ***Sartoris Road Property***) on 11 July 1985. On 1 May 2012, Mr Coronica signed a transfer of his interest in the Sartoris Road Property to Mr and Mrs Davis (the **Davis's**). By loan agreement dated "2012" between Mr Coronica and the Davis's, Mr Coronica loaned $525,000 to the Davis's (the ***Davis Loan***) secured by a mortgage over the Sartoris Road Property. By declaration of trust dated 30 April 2012, Mr Coronica declared a bare trust over the Sartoris Road Property mortgage in favour of the Fund. Three subsequent mortgages in favour of Mr Coronica were granted by the Davis's in respect of the Sartoris Road Property. The subsequent mortgages were registered on 2 April 2014, 26 October 2015 and 28 July 2016.

83. Mr Coronica was registered as the owner of half of the property at Grassy Road, King Island in Tasmania (the ***Grassy Road Property***) on 15 February 2001. Ownership of the remaining half of the property was registered on the same date to the Davis's. On around 19 April 2012, Mr Coronica transferred his share of the Grassy Road Property to Mr and Mrs Millwood (the ***Millwoods***). Mr Millwood is the Davis's son-in-law. By loan agreement dated "2012", Mr Coronica loaned the Millwoods $585,000 (the ***Millwood Loan***) secured by a mortgage over the Grassy Road Property. By declaration of trust dated 30 April 2012, Mr Coronica declared a bare trust over the Grassy Road Property mortgage in favour of the Fund.

84. On 21 May 2014, a property at Middleborough Road Blackburn Victoria (the ***Middleborough Road Property***) was transferred to Ms Rigoli. By loan agreement dated 19 June 2014, Mr Coronica loaned $270,000 to Ms Rigoli (the ***Rigoli Loan***) secured by a mortgage over the Middleborough Road Property. On 19 August 2014, Ms Rigoli executed the mortgage. The mortgage was registered on 20 August 2014. By declaration of trust dated 20 August 2014, Mr Coronica declared a bare trust over the Middleborough Road Property mortgage in favour of the Fund.

85. As stated above, the "basic meaning" of in-house asset in s 71(1) of the SISA includes "an asset of the fund ……that is an investment in a related trust of the fund…". "Related trust", of a superannuation fund, is defined in s 10(1) to mean, relevantly "…. a trust that a member … of the fund controls (within the meaning of section 70E) …"

86. Pursuant to s 70E(2), an entity controls a trust if:

(a) a group in relation to the entity has a fixed entitlement to more than 50% of the capital or income of the trust; or

(b) the trustee of the trust, or a majority of the trustees of the trust, is accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of a group in relation to the entity (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts;

(c) a group in relation to the entity is able to remove or appoint the trustee, or a majority of the trustees, of the trust.

87. Pursuant to s 70E(3)(a), group, in relation to an entity, means:

(a) the entity acting alone;

(b) a Part 8 associate of the entity acting alone; or

(c) the entity and one or more Part 8 associates of the entity acting together; or

(d) 2 or more Part 8 associates of the entity acting together.

88. Section 70B(e) defines a "Part 8 associate" of an individual to include "a trustee of a trust (in the capacity of trustee of that trust), where the primary entity [being the individual] controls the trust."

89. The Tribunal agrees with the Commissioner's analysis that Mr Coronica further breached the in-house asset rules by investing in the trusts over the Mortgage Loans in the 2012 to 2014 income years. These investments were in-house assets of the Fund because Mr Coronica, as a member of the Fund, and sole trustee of the trusts over the Mortgage Loans, controlled those trusts within the meaning of ss 70E(2), 70E(3)(a) and 70B(e) of the SISA. It follows, that the investment in the trusts over the Mortgage Loans was an investment in a related trust of the Fund within the meaning of s 71(1) of the SISA.

90. As the investments in the trusts over the Mortgage Loans were acquired when the Fund's existing in-house assets exceeded the prescribed limit, the trustees of the Fund breached

ss 83(2) and 84(1) of the SISA. Further, the trustees of the Fund breached ss 82 and 84(1) of the SISA by failing to divest in-house assets equal to or greater than the excess amounts of in-house assets held by the Fund during the 2010, 2011, 2012 and 2013 income years.

Section 62(1) – sole purpose test

91. Section 62(1) of the SISA provides that each trustee must ensure that the fund is maintained solely for one or more of the core or ancillary purposes prescribed under the section. The specified purposes essentially relate to the provision of retirement or death benefits for fund members. Section 62(1) is a civil penalty provision.

92. The non-arm's length acquisition of the Company Shares by the Fund and subsequent payment of dividends to the Fund in the 2009 financial year involved the trustees contravening s 62(1) of the SISA because the Fund was not being maintained for the sole purposes prescribed in the SISA. In particular, by reason of the transfer of the Company Shares, dividends paid by the Company that would otherwise have been taxed at Mr Coronica's higher marginal tax rate were taxed at the concessional tax rate of 15% and the Fund was able to access franking credits. It can be inferred that Mr Coronica sought to minimise his tax liability. Mr Coronica did not disabuse the Tribunal of the adverse inference drawn as he failed to provide any cogent reasons explaining why the acquisition of the Company Shares was in the best interests of the Fund. The same conclusion was reached in the Initial Tribunal Reasons at [226(d) and (e)].

93. Additionally, the Initial Tribunal Reasons recounted numerous other contraventions of s 62(1) due to a number of matters during the 2009 income year, including the circumstances of the 2009 Member Loan, which was made on uncommercial terms, the fact the Fund assets were paid directly to Mr Coronica and were mixed with Mr Coronica's personal assets, and the manner in which the Fund's accounting records were maintained suggesting that the Fund was being maintained for Mr Coronca's personal benefit, rather that solely for the retirement purposes prescribed by s 62(1). These were different circumstances to those considered by the Full Court of the Federal Court in relation to the sole purpose test in *Aussiegolfa Pty Ltd v Federal Commissioner of Taxation* (2018) 264 FCR 587. The Full Court decided at [176] that "the statutory context in which s 62 appears does not suggest that a fund will not be treated as being maintained solely for the core purposes … simply because the trustee enters into a related party transaction".

Sections 35A(1) and 35AE – accounting records

94. Section 35A(1) of the SISA as in force during the 2009-2013 income years provided that each trustee of an SMSF must ensure that:

> *(a) accounting records that correctly record and explain the transactions and financial position of the entity are kept; and*
>
> *(b) …..*
>
> *(c) ….. – the accounting records are kept in a way that enables the following to be prepared:*
>
> *(i) the accounts and statements of the entity referred to in section 35B;*
>
> *(ii) the returns of the entity referred to in section 35D; and*
>
> *(d) the accounting records of the entity are kept in a way that enables those accounts, statements and returns to be conveniently and properly audited in accordance with [the SISA].*

95. A contravention of former s 35A(1) is an offence of strict liability.

96. From 1 July 2013, former s 35A(1) was repealed and replaced by s 35AE which was expressed in relevantly identical terms.

97. The trustees of the Fund contravened s 35A(1) during the 2009-2013 income years and s 35AE in the 2014 income year due to, amongst other things, generally failing to accurately record and keep records regarding the details of the Fund's transactions as and when they occurred, so as to be enable accounts, statements and returns to be properly audited in accordance with the SISA. The records kept by Mr Coronica show that he allowed payments to the Fund to be made directly to his personal bank account and he also failed to transfer such funds to the Fund CBA Account. Additionally, the suspense account was maintained in a manner that involved the eventual reporting of Fund contributions and payments, but not the actual transactions on the dates on which they occurred. In this way, Mr Coronica, as a trustee, was able to exercise discretion in an ad hoc way, at the end of each financial year, as to how to reflect the transactions.

98. During the relevant period, the Fund's transactions were also not conducted through the Fund CBA Account. Instead, as set out above, Mr Coronica maintained a "suspense account" in respect of the Fund. He recorded credit entries for amounts paid by him on behalf of the Fund or assets otherwise "contributed" by him to the Fund, and debits for transfers from the Fund CBA Account to himself or amounts deposited directly by third

parties into his personal bank account. For example, details of the suspense account for the 2012 income year are as follows:

	Dr	Cr
Amount contributed by Mr Coronica		
Suspense Account balance from prior year		$70,702.46
Investment – J & D Millwood mortgage loan		$585,000.00
Investment – J & G Davis mortgage loan		$525,000.00
Shares		$40,000.00
Audit fee		$500.00
Total		**$1,221,202.46**
Various cash transfers for the Fund paid to Mr Coronica		
Loan repayments for the Fund collected by Mr Coronica:		
J & D Millwood mortgage loan	$150,000.00	
J & G Davis mortgage loan	$200,000.00	
C Rigoli mortgage loan	$100,000.00	
Randazzo & Angele mortgage loan	$170,000.00	
Interest on loans for the Fund collected by Mr Coronica		
	Dr	**Cr**
J & G Davis mortgage loan	$32,500.00	
C Rigoli mortgage loan	$8,000.00	

J & D Millwood mortgage loan	$3,575.34	
Randazzo & Angele mortgage loan	$6,109.59	
Various cash transfers by the Fund to Mr Coronica	$165,324.66	
Total	**$835,509.59**	
Difference		**$385,692.87**

99. At the end of each financial year, Mr Coronica as trustee of the Fund, allocated the net balance of the "suspense account" as dividends from the Company or as taxable or non-deductible contributions attributable to his member account in his absolute discretion.

100. The suspense account and allocations for the 2013 and 2014 financial years followed a similar format. In total, for the 2012 to 2014 financial years, the contributions made by Mr Coronica to the Fund, and payments by the Fund to Mr Coronica, were as follows:

	2012	**2013**	**2014**
Contributions	$1,221,202.46	$317,000.00	$415,450.00
Payments by the Fund to Mr Coronica	$835,509.59	$249,000.00	$195,450.00
Difference	$385,692.87	$68,000.00	$220,000.00

101. With reference to the accounting records kept, Mr Coronica proudly explained that he still did things "the old-fashioned way" but, in doing so, he refused to accept that way was at odds with the accuracy requirements of the SISA. Mr Coronica's way of doing things was also not in accordance with the prescribed operating standards set out in the SIS Regulations which had to be complied with at all times: per s 34(1) of the SISA. It suffices to note that reg 4.09A(2), which came into effect on 7 August 2012 provides that a trustee of a superannuation fund must keep the money and other assets of a fund separate from those held for the trustee personally. Mr Coronica did not do so from 7 August 2012 and throughout 2013 and 2014 income years.

The Initial Tribunal's findings adopted by the Tribunal on remittal

102. The Tribunal's findings on remittal regarding the alleged contraventions are coherent with the findings made by the Initial Tribunal at [323]-[324], as set out below:

> *323. The contraventions here are numerous. The trustee's actions or inactions:*
>
> *a. involve multiple contraventions in the 2009 financial year and the contraventions extend over a period of time, including in the 2008 year through to the 2013–14 year;*
>
> *b. go well beyond the acquisition of [G Coronica Nominees Pty Ltd];*
>
> *c. were implemented by an experienced accountant, registered tax agent and registered company auditor, who ought to have known that the arrangements constituted contraventions of the Act;*
>
> *d. were in breach of the provisions of the [Fund Trust] deed;*
>
> *e. were in breach of the trustee's covenants to keep the money and other assets of the Fund separate from those held by the trustee personally;*
>
> *f. involved Mr Coronica being advanced, interest-free and unsecured, significant current day financial benefits for periods in the order of 9 to 12 months in at least two years;*
>
> *g. involved Mr Coronica providing interest-free credit to the Fund for periods in the order of six months or more in at least more than one year;*
>
> *h. involved the intentional acquisition of a related company for the dominant purpose of receiving franked dividends out of pre-acquisition profits and to provide personal income tax benefits and a contravention of the Sole Purpose test;*
>
> *i. involved the lodgement of the 2009 Income Tax Return (and preparation of the Statement of Financial position) with misleading disclosure of the true asset and liability position of the Fund;*
>
> *j. Involved Mr Coronica's reliance on his undocumented valuation of his private investment company that, while not wilful, was grossly negligent if not incompetent; and*
>
> *k. the contravention in (h) above was not corrected within amnesty periods made public by the Commissioner and only corrected well after the Commissioner's audit activities had concluded.*
>
> *324. The Tribunal finds that the number and nature of the contraventions of the standards required of trustees of superannuation funds to be concessionally taxed are very serious. The seriousness is amplified by the standing of Mr Coronica as an experienced accountant, registered tax practitioner and registered company auditor.*

103. In reaching the Initial AAT Disqualification Decision, Senior Member James also made the following findings with respect to Mr Coronica, which are also adopted by the Tribunal. References below are to the paragraphs of the Initial Tribunal Reasons:

(a) Mr Coronica's evidence demonstrated a failure to comprehend the character of the obligations of a trustee [347], [348].

(b) Mr Coronica exhibited a "misplaced opinion of his capability and competence" [40] and an attitude that "accurate compliance in his own affairs had a low priority" [45] and made "constant assertion[s]" that the use of a "suspense account" was an "acceptable accounting practice sanctioned in documents issued by both APRA and the Commissioner", being opinions which were found in the Initial Tribunal Reasons to be "without any merit" [46], [53], [160],[162],[192]-[193] and [200]. Mr Coronica also gave evidence that his erroneous valuation method should be accepted as complying with the SISA [93] and [95], and that his personal banking statements contained records of the receipts/payments of the Fund [181].

(c) Mr Coronica's workings and evidence demonstrated a lack of competence and the seriousness of his errors and inaccuracies was magnified by his status as a CPA of over 50 years' experience [347], [348].

(d) Mr Coronica's explanations for the contraventions of the SISA found by the Tribunal were neither reasonable, nor reasonably arguable as that concept applies in income tax legislation [350].

(e) Mr Coronica's evidence was that he had little regard to the Fund's Trust Deed and provisions of the SISA prescribing the duties of trustees [43].

(f) Mr Coronica was aware that his management of the Fund contravened the SISA [44].

(g) Mr Coronica took steps to "attempt to disguise the Fund's indebtedness to a member, from the Commissioner and/or the Fund's auditor" [44] and, furthermore, this involved a "conscious and deliberate act" [202].

(h) Mr Coronica intentionally entered a non-arm's length acquisition of the Company Shares for the purpose of the Fund obtaining tax benefits from the payment of franked dividends out of pre-acquisition profits [112], [226(d)] and [323(h)].

(i) Mr Coronica's conduct involved the lodgement of his 2009 income tax return and preparation of the Statement of Financial Position "with misleading disclosure of the true asset and liability position of the Fund" [323(i)]; and

(j) Mr Coronica's only voluntary "correction" of a breach was in respect of the acquisition of the Company Shares and the consequential franking credits. The correction was made only after the audit concluded. The consequences and impacts of the contraventions otherwise remained in place [312(d)].

104. As stated above, none of the abovementioned findings were challenged by Mr Coronica in the Appeal and the Tribunal accordingly adopts them having regard to the way in which the remittal hearing proceeded.

WERE THE STATUTORY GROUNDS FOR DISQUALIFYING MR CORONICA IN SUBSECTIONS 126A(1) AND (3) ESTABLISHED? IF SO, SHOULD THE TRIBUNAL EXERCISE THE DISCRETION TO DISQUALIFY MR CORONICA AS A TRUSTEE OF A SUPERANNUATION FUND?

105. There can be no doubt that there were numerous contraventions of the SISA in the 2009 to 2014 income years which had been established for the purposes of s 126A(1) of the SISA. The nature of the contraventions were significant. They involved key prohibitions in the SISA regarding certain transactions and, additionally, ongoing operational matters. The contraventions were serious viewed in the context of the regulatory regime for superannuation funds. The seriousness of the contraventions is also underscored by the fact that some contraventions may result in criminal offences. For example, a contravention of s 66(1) of the SISA is an offence punishable on conviction by imprisonment for a term not exceeding 1 year: see 66(4).

106. The contraventions of the SISA were multiple and, in some cases, repeated in the period spanning the 2009 to 2014 income years. In all cases, the contraventions arose directly from Mr Coronica's actions (or inactions) and own views about the SISA. In other words, the contraventions were not claimed to be accidental or due to honest mistakes, nor did Mr Coronica seek and rely on external independent advice. Mr Coronica was accountable

in all situations and clearly failed to act professionally, competently and with due diligence in carrying out his duties as a trustee of the Fund.

107. The Commissioner submitted that the Tribunal should be satisfied that the essentially uncontested findings in the Initial Tribunal Reasons should enliven the discretion in ss 126A(1) and (3). The Commissioner also argued that having regard to the nature, seriousness and number of the contraventions, as well as the fact that Mr Coronica demonstrated himself to not be a fit and proper person, the Disqualification Decision is justified under ss 126A(1) and 126A(3). The Commissioner requested the Tribunal to accordingly affirm the Disqualification Decision.

108. The Commissioner pointed to Mr Coronica's lack of insight into the seriousness of the contraventions, noting that Mr Coronica continued to assert and variously submitted the following at the remittal hearing:

(a) the alleged breaches have not been established;

(b) the issues related to the disqualification were confined to the 2009 year;

(c) he undertook accounting the old-fashioned way and there was no need for chronological records;

(d) the Disqualification Decision did not have regard to an amnesty offered by the Commissioner which had been accepted by him;

(e) contrary to the decision by Justice Davies in the Appeal, the financial consequences of the issue of the Non-Compliance Decision continue to be relevant to the discretionary review of the Disqualification Decision;

(f) disqualification is inappropriate given that audit certificates were granted in later income years with no reportable breaches; and

(g) the Commissioner had "recanted" and made the Fund complying in later income years on the basis that Mr Coronica is a fit and proper person to be a trustee of his Fund, and to administer his Fund.

109. Mr Coronica's position was that the Disqualification Decision was an overreach by the Commissioner because "any breaches that I'm alleged to have made, everything has

been corrected. And now the essence of the fund is basically cash and shares." That is, Mr Coronica sought to portray the contraventions as minor, legacy problems, all of which had since been rectified and that he was a fit and proper person to continue as a trustee of his SMSF. Mr Coronica was adamant that he wanted to remain trustee of his SMSF or, as an alternative, have his daughter appointed as trustee of his SMSF. This was ventilated in the course of Mr Coronica suggesting an alternative position, not relevant to the present proceeding, namely, that the Commissioner should revoke the Disqualification Decision. Mr Coronica submitted, as follows:

> *… I accept the disqualification. The ATO agree to give me a revocation letter within 30 days or whatever. And one of the – and I'm entitled to offer undertakings, and the undertakings that I would have another trustee – another trustee in the fund would be my daughter. So everybody would be happy. The ATO has won, I'd continue with my life, and basically, you know, makes your job a bit easier, Senior Member.*

110. The above highlighted to the Tribunal that Mr Coronica wanted to maintain control of his SMSF but he did not genuinely accept responsibility. He offered to give the same undertakings that were previously accepted by Senior Member James in lieu of the Disqualification Decision (see [22] above).

111. The Tribunal does not accept Mr Coronica's abovementioned submissions or that the undertakings proffered are appropriate and reasonable in lieu of the Disqualification Decision. The Tribunal formed the view that Mr Coronica's continued lack of contrition and acceptance of responsibility for the contraventions of the SISA demonstrate his unsuitability for the role of trustee of a SMSF. In the circumstances, there is still a continued risk of future non-compliance even if the Fund is now comprised only of cash and shares in listed entities.

112. While the Tribunal acknowledges Mr Coronica's passion and enthusiasm for accounting, it was patently clear Mr Coronica did not have the proper discipline and focus with respect to the regulatory regime governing superannuation funds. Instead, the Tribunal finds that Mr Coronica adopted an opportunistic attitude to suit his self-interests as he took advantage of his role as a trustee of the Fund. He also exhibited a wilful disregard for the serious consequences to the Fund and himself as trustee. Moreover, once the Commissioner audited the Fund, he doubled down to defend his questionable positions rather than taking responsibility and properly remedying all breaches. The doggedness with which Mr Coronica maintained his interpretations of the law before the Initial Tribunal

and at the remittal hearing was similar to that of the Applicant in *WZWK and Commissioner of Taxation* [2023] AATA 872 at [255]. In that case, in the context of considering the exercise of the discretion to disqualify, Senior Member Grigg concluded that "[t]he Applicant, in his position, ought to have known the correct steps to be taken. The fact that he took none of them, and appears to lack a decent understanding of them, leads to a finding that the Applicant is not a fit and proper person." Those observations are equally applicable to Mr Coronica.

113. It is appropriate to record, for completeness, that in relation to Mr Coronica's submission that the Commissioner had "recanted" on Mr Coronica's status as a fit and proper person, the practical reality is that the Commissioner had advised the Fund, by letter dated 21 November 2022, that the Commissioner would issue a notice of compliance under s 40(1) of the SISA for the 2017-2018 income years and provided a Position Paper setting out the Commissioner's reasons for decision (the ***2019 Position Paper***). The Commissioner concluded in the 2019 Position Paper that, in addition to the alleged contraventions with respect to the 2009 to 2014 income years (the subject of the Disqualification Decision), the trustees of the Fund allegedly contravened the following provisions of the SISA in the income years indicated (the ***2015 to 2019 Alleged Contraventions***):

SISA provision	**Years**
66(1)	2014-2015 year 2015-2016 year 2016-2017 year
35AE	2014-2015 year 2015-2016 year
35B(2)	2014-2015 year 2015-2016 year 2016-2017 year 2017-2018 year

34(1)	2014-2015 year
109	2018-2019 year
65(1)	2018-2019 year
62	2014-2015 year
35D(1)	2016-2017 year 2017-2018 year
67(1)	2016-2017 year

114. The Commissioner expressly stated in the 2019 Position Paper at [159]-[160]:

> *We understand that this paper is focused on the fund's complying status, but we cannot ignore the number and seriousness of the contraventions identified in the 2009-2010 to 2018-2019 income years, and therefore would propose that you represent a risk to future compliance.*
>
> *We believe that the number and seriousness of the contraventions would be grounds for an individual to be disqualified from acting as a trustee of a SMSF. However, you were disqualified on 6 September 2018, and therefore the Commissioner is not able to disqualify an individual who is already disqualified – so we have not expanded further on this position in this paper.*

115. Granted, the 2015 to 2019 Alleged Contraventions are not the subject of the present application for review. However, they are recent events which provide context. In particular, the above extracts suggest that Mr Coronica has form. They also show Mr Coronica's character. His failure to appreciate he was continuing to attract the scrutiny of the Commissioner because of the pattern of contraventions in subsequent financial years was a matter of concern. Finally, it is unlikely that Mr Coronica would have misunderstood the tenor of the Commissioner's position on his status in the 2019 Position Paper, that is, the Commissioner had not at all "recanted" and it is quite mischievous for Mr Coronica to have suggested that was the case. Rather, as self-evident from the extract, the Commissioner stated that he could not disqualify Mr Coronica from acting as trustee seeing as he had already been disqualified. Mr Coronica's cavalier attitude to his predicament only serves to reinforce the Tribunal's concerns regarding Mr Coronica's capacity to properly discharge the duties of a trustee of a SMSF.

116. The Tribunal also lends particular credence to the object of the SISA when considering the regulatory actions that should be taken in these proceedings in the exercise of the discretion. Section 3 of the SISA confirms "[t]he main object of this Act is to make provision for the prudent management of certain superannuation funds… and for their supervision by … the Commissioner of Taxation", amongst others. Furthermore, s 3(2) of the SISA states that a basis for supervision is that those funds "may become eligible for concessional tax treatment". Section 4 of the SISA relevantly states that ss 5 and 6 of the SISA set out the functions, powers and duties of the Commissioner, amongst others, in administering the SISA. Pursuant to s 4, the Commissioner is generally responsible for SMSFs, amongst other things, and the Commissioner must also administer the relevant tax laws vis-à-vis SMSFs in accordance with the framework set out in ss 5 and 6 of the SISA.

117. Therefore, the question of general deterrence, as well as specific deterrence, looms large in the exercise of the discretion in light of the regulatory regime. Mr Coronica relied on the decision of Deputy President Justice Thawley in the Merchant AAT Decision (see [49] above) to support his contention that disqualification of him as a trustee of a SMSF was not appropriate. Indeed, according to Mr Coronica, if Mr Merchant was not disqualified nor should he be disqualified.

118. In the Merchant AAT Decision, it is significant to note that Deputy President Justice Thawley identified the following factual matters:

    (a) The actions of Mr Merchant as a director of a corporate trustee concerned a singular transaction, in respect of which Ernst and Young had provided him with advice and he had not been advised by them that the share sale risked breaching the provisions of the SISA. Ernst and Young acted as the auditors of that Fund.

    (b) The Commissioner's decision was that Mr Merchant was a fit and proper person in relation to s 126A(3) of the SISA.

    (c) Mr Merchant gave undertakings which the Tribunal accepted as appropriate, reasonable and which mitigated the risk of future non-compliance.

119. His Honour also set out several observations in the course of reaching the decision to set aside the Commissioner's decision to disqualify Mr Merchant under s 126A(2). *Firstly*, the

Tribunal considered "a risk of future non-compliance to be unlikely". This was further explained as being due to the fact "Mr Merchant is a fit and proper person" and "Mr Merchant has given undertakings which the Tribunal accepts." *Secondly,* the Tribunal in the Merchant AAT Decision determined "not [to] place significant weight on protecting the investing public against the risk of re-offending." That was because "Mr Merchant is only ever likely to be a director of the trustee of his own superannuation fund' and "[t]o the extent that it is relevant, [the Tribunal did] not believe Mr Merchant needs protecting from himself. To the extent he does, compliance with his undertakings offers sufficient protection." *Thirdly*, the Tribunal identified that "[t]he breaches were serious, but the … offending transaction was one put forward [by the auditors of the fund] without apparently raising an issue from a superannuation compliance perspective [which] is a significant mitigating factor." *Fourthly*, the Tribunal "acknowledge[d] that [the auditors] advised that there were tax risks, but that is a different issue." *Fifthly,* the Tribunal concluded that in "[f]ocussing on the objects of the SISA, I do not see any useful purpose served by disqualification in the peculiar circumstances of this case."

120. Mr Coronica stated that, similarly to Mr Merchant, there was no demonstrable risk of future non-compliance and he had also similarly offered undertakings, including to appoint and continue to engage an independent accountant, tax agent and auditor to prepare the appropriate accounts, returns and reports (see [22] above). Mr Coroncia also sought to downplay and distinguish his situation on the basis that Mr Merchant was involved in a contravention of the SISA concerning a transaction with tens of millions of dollars in potential loss of revenue to the Commonwealth, whereas Mr Coronica claimed to have acted in moderation and had an otherwise impeccable tax compliance record.

121. Mr Coronica also submitted that there were relatable comparisons between Mr Merchant and himself in that they were only ever a risk to themselves (and their SMSFs), and not the investing public; that all matters of prior concern had been rectified; and the undertakings offered provided sufficient and ongoing assurance with respect to issues of deterrence.

122. Mr Coronica emphasised that the fact that Senior Member James had accepted undertakings in the Initial Tribunal Reasons was a forceful factor in the Tribunal exercising the discretion in his favour. Mr Coronica further argued that, having regard to the objects of the SISA, no useful purpose was served by the disqualification especially as he, like Mr

Merchant were also past pension age. Finally, Mr Coronica submitted that the Merchant AAT Decision was consistent with the conclusion of the Initial Tribunal to the effect that the Disqualification Decision regarding Mr Coronica should be set aside in accordance with [365]-[366] of the Initial Tribunal Reasons; see also [182]-[186] of the Merchant AAT Decision.

123. I was not persuaded that Mr Coronica's situation was similar to that of Mr Merchant. I was also not satisfied that the undertakings should be accepted in lieu of the disqualification of Mr Coronica acting as a trustee of a superannuation fund. As stated above, Mr Merchant had been found to be a fit and proper person by the Commissioner whereas Mr Coronica was not a fit and proper person.

124. Mr Merchant had undertaken the relevant transactions based on independent advice, and there was no suggestion at the time of entering into the transaction that his actions were unlawful. Mr Coronica did not seek external advice and was involved in multiple contraventions over many years, as set out above and in the Initial Tribunal Reasons. Some of these contraventions "carried on or overlapped from earlier years" as Mr Coronica put it, because "the same breach repeated over the years" but this only served to highlight Mr Coronica's recklessness. Mr Coronica was reluctant to cede control of his SMSF as evident from his alternative proposal to allow his daughter to be the trustee.

125. The Tribunal also agrees with the Commissioner's submissions that it is appropriate to take into account the objects of the SISA in applying ss 126A(1) and (3), and deterrence generally. Deputy President Justice Thawley stated that "[f]ocussing on the objects of the SISA, I do not see any useful purpose served by disqualification in the peculiar circumstances of this case". Mr Coronica's situation is different for the reasons set out above. Accordingly, it is appropriate that he is sanctioned with a disqualification to preclude him from acting as a trustee of a superannuation fund. That consequence is inflicted on him because he is not presently a fit and proper person to act as trustee of a superannuation fund: see *Commissioner of Taxation v Coronica* [2022] FCA 72 at [22].

CONCLUSION

126. Having regard to the above matters, including the objects of the SISA, the Tribunal cannot be satisfied on the balance of probabilities that Mr Coronica does not present a future compliance risk and will not deviate again from the standards required of him as a trustee

of a superannuation fund, even if the undertakings were accepted. This is especially the case as Mr Coronica was reluctant to unconditionally accept responsibility for the contraventions of the SISA. While Mr Coronica may have an otherwise unblemished record, this was not sufficient to outweigh the findings that he no longer met the fit and proper person requirement for being a trustee of a superannuation fund. In all the circumstances, the Tribunal is not prepared to exercise the discretion to set aside the Disqualification Decision.

DECISION

127. The decision under review being the Disqualification Decision is affirmed.

I certify that the preceding one-hundred-and-twenty-seven (127) paragraphs are a true copy of the reasons for the decision herein of Senior Member G Lazanas.

.....**[Sgd]**.....

Associate

Dated: 19 July 2024

Date of hearing:	**29 January 2024 - 1 February 2024**
Date final submissions received:	**7 June 2024**
Applicant:	**Self-represented**
Counsel for the Commissioner:	**Ms M Schilling**
Solicitors for the Commissioner:	**Mr J Clarke, Australian Taxation Office**