

***JUD/\*2015\*FCA12 -***

ATTACHMENT A

8

FOR JUDGE T

ORIGINAL

(continued)

6/8



STATEMENT OF AGREED FACTS

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1523 OF 2012

NEIL OLESEN  
DEPUTY COMMISSIONER OF TAXATION  
(SUPERANNUATION)  
Applicant

EARLY SUNSHINE PTY LTD  
First Respondent  
and others named in the Schedule  
Respondents



The following is a statement of facts for the purposes of s.191 of the *Evidence Act 1995* (Cth), which the parties agree should be accepted by the Court as a basis upon which determination of the Applicant's claim for final relief for the admitted contraventions should be based.

A reference to "the Act" is a reference to the *Superannuation Industry (Supervision) Act 1993* (Cth).

**A. Relevant individuals and entities**

1. The Applicant is a Regulator for the purposes of section 197 of the Act.
2. The First Respondent was incorporated on or about 15 March 2000.
3. The Second Respondent has been a director of the First Respondent since 26 June 2001.
4. The Third Respondent has been:
  - 4.1. a director of the First Respondent since 29 March 2000;
  - 4.2. a shareholder of the First Respondent since 29 March 2000; and
  - 4.3. the Managing Director of the Business (referred to in paragraph 7.2, below) since 29 March 2000.
5. The Fourth Respondent has been:
  - 5.1. a director of the First Respondent since 29 March 2000; and
  - 5.2. a shareholder of the First Respondent since 29 March 2000.

Filed on behalf of the Applicant, Neil Olesen, Deputy  
Commissioner of Taxation, Superannuation.

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6. The Second, Third and Fourth Respondent were the only directors of the First Respondent during the relevant period, being 25 June 2007 to 30 June 2011 ("the **relevant period**").
7. George MacDonald & Sons Pty Ltd ("**George MacDonald & Sons**"):
  - 7.1. was incorporated in or about 1981;
  - 7.2. at all relevant times has carried on a freight trucking business based on the New South Wales central coast ("the **Business**"); and
  - 7.3. was also the Trustee of the Fund (described in paragraph 17, below) in the period 2 June 1995 to 31 March 2000.
8. Since 29 March 2000 the Second, Third and Fourth Respondents have been employees and directors of George MacDonald & Sons.
9. The Second, Third and Fourth Respondents have been employed by George MacDonald & Sons in the Business as follows:
  - 9.1. the Second Respondent has been employed in the Business since 7 May 2001;
  - 9.2. the Third Respondent has been employed in the Business since 27 November 1991; and
  - 9.3. the Fourth Respondent has been employed in the Business since 1 March 1994.
10. Vertu Pty Ltd ("**Vertu**") was incorporated on 6 August 2001. Since approximately 8 August 2001 the Third Respondent has been a director and shareholder of Vertu.

**B. The Business**

11. Prior to the incorporation of George MacDonald & Sons in 1981, the Business was carried on by Joseph George McDonald.
12. In or around 1981, the Business was acquired by George MacDonald & Sons.
13. From the late 1960s to 2001, the Business's principal customer was Rosemount Estate, the producers of Rosemount Wines.
14. In 2003, Rosemount Estate was acquired by Southcorp Holdings. As a result of this acquisition, the Business lost Rosemount Estate as a customer. The consequences for the Business were that it came under significant financial stress, as indicated by the fact that in the course of the few years after 2001:
  - 14.1. the number of trucks operated by the Business reduced from 15 to 4; and
  - 14.2. the number of staff employed by the Business reduced from 25 to 7 and certain staff, including the fathers of the Second, Third and Fourth Respondents had to take early retirement.
15. In or around 2007 and 2008 the Business came under further financial stress as a result of a number of factors, including:
  - 15.1. difficulties experienced by the Business in recovering amounts owed to it by the Business's debtors (customers); and
  - 15.2. general uncertainty in the Australian economy brought about by the global financial crisis, which affected businesses across Australia and forced many of

them to restrict their operations, making them less likely to use the Business' services.

16. As a result of the financial stress and difficulties referred to in paragraphs 14 and 15, above, the Business experienced difficulties paying salaries and wages to its staff. It put the Business in a position, where its proprietors were forced to choose whether to keep the business running or shut it down. The difficulties of the Business to pay salaries and wages arose in 2007 and continued through to 2011.

**C. Establishment of the George MacDonald & Sons Pty Ltd Superannuation Scheme No. 2**

17. The George MacDonald & Sons Pty Ltd Superannuation Scheme No. 2 ("**the Fund**") was established on or about 2 June 1995.
18. George MacDonald & Sons was the Trustee of the Fund for the period 2 June 1995 to 31 March 2000. The First Respondent was the Trustee of the Fund from 31 March 2000 to the present.
19. The members of the Fund are the Second, Third and Fourth Respondents.
20. From 2 June 1995 to 23 August 2011 the Fund was a "regulated superannuation fund" within the meaning that term has in section 19 of the Act. The Trustee resolved to wind up the fund on 23 August 2011.
21. The Fund became regulated by the Commissioner as a self-managed superannuation fund within the meaning that term has in section 17A of the Act.
22. On 28 October 2011 the Commissioner declared that, pursuant to section 40 of the Act, the Fund was non-complying. The consequences of the Fund having been declared non-complying are described in paragraph 74 and following, below.

**D. Financial Position of the Fund**

**As at 30 June 2007**

23. On or about 2 June 2008, the Income Tax and Regulatory Returns of the Fund in respect of the financial year ended 30 June 2007 were prepared by the Respondents' tax agent, Mr Lin B Chen of Powe Partners.
24. In the Income Tax and Regulatory Return of the Fund for the financial year ended 30 June 2007 ("**the 2007 Return**"), the following information was returned:
  - 24.1. the Fund was established on 2 June 1995;
  - 24.2. the trustee of the Fund was the First Respondent;
  - 24.3. the income of the Fund included interest of \$407 and gross distribution from trusts of \$167; and
  - 24.4. the assets of the Fund totalled \$141,448.00.
25. The 2007 Return was signed by the Third Respondent and lodged with the Commissioner on or about 11 June 2008.
26. The Members Statements of the Fund for the financial year ended 30 June 2007 recorded an account balance in respect of the Second to Fourth Respondents as follows:



- 26.1. \$25,982.52 for the Second Respondent;
- 26.2. \$52,988.35 for the Third Respondent; and
- 26.3. \$53,689.28 for the Fourth Respondent.
- 27. The 2007 Members Statements were signed by the Second, Third and Fourth Respondents as directors of the Trustee of the Fund and dated 2 June 2008.
- 28. As at 30 June 2007, the Westpac Bank account of the Fund had a balance of \$23,132.94.

**As at 30 June 2008**

- 29. On or about 24 September 2009, the Income Tax and Regulatory Returns of the Fund in respect of the financial year ended 30 June 2008 were prepared by the Respondents' tax agent, Mr Lin B Chen of Powe Partners.
- 30. In the Income Tax and Regulatory Return of the Fund for the financial year ended 30 June 2008 ("the **2008 Return**"), the following information was returned:
  - 30.1. the income of the Fund included gross interest of \$90 and gross trust distributions of \$1,152; and
  - 30.2. the total assets of the Fund comprised \$116,316.00.
- 31. The 2008 Return was signed by the Third Respondent and lodged with the Commissioner on or about 24 September 2009.
- 32. The Members Statements of the Fund for the financial year ended 30 June 2008 recorded an account balance in respect of the Second to Fourth Respondents as follows:
  - 32.1. \$22,772.83 for the Second Respondent;
  - 32.2. \$46,442.57 for the Third Respondent; and
  - 32.3. \$47,056.91 for the Fourth Respondent.
- 33. The Members Statements were signed by the Second, Third and Fourth Respondents as directors of the Trustee of the Fund and dated 22 September 2009.
- 34. As at 30 June 2008, the Westpac Bank account of the Fund had a balance of \$19,490.33.

**As at 30 June 2009**

- 35. On or about 24 October 2009, the Income Tax and Regulatory Returns of the Fund in respect of the financial year ended 30 June 2009 were prepared by the Respondents' tax agent, Mr Lin B Chen of Powe Partners.
- 36. In the Income Tax and Regulatory Return of the Fund for the financial year ended 30 June 2009 ("the **2009 Return**") the following information was returned:
  - 36.1. the income of the Fund included gross interest of \$110 and gross trust distributions of \$1,267; and
  - 36.2. the total assets of the Fund comprised \$97,913.00.

37. The 2009 Return was signed by the Third Respondent and lodged with the Commissioner on or about 24 October 2009.
38. The Members Statements of the Fund for the financial year ended 30 June 2009 recorded an account balance in respect of the Second to Fourth Respondents as follows:
  - 38.1. \$19,168.11 for the Second Respondent;
  - 38.2. \$39,091.15 for the Third Respondent; and
  - 38.3. \$39,608.26 for the Fourth Respondent.
39. The Members Statements were signed by the Second, Third and Fourth Respondents as directors of the Trustee of the Fund and dated 29 October 2009.
40. As at 30 June 2009, the Westpac Bank account of the Fund had a balance of \$20,897.96.

**As at 30 June 2010**

41. On or about 16 June 2011 the Income Tax and Regulatory Returns of the Fund in respect of the financial year ended 30 June 2010 were prepared by the Respondents' tax agent, Mr Lin B Chen of Powe Partners.
42. In the Income Tax and Regulatory Return of the Fund for the financial year ended 30 June 2010 ("the **2010 Return**"), the following information was returned:
  - 42.1. the income of the Fund included gross interest of \$374 and gross trust distributions of \$988; and
  - 42.2. the total assets of the Fund comprised \$127,257.00.
43. The 2010 Return was signed by the Third Respondent and lodged with the Commissioner on or about 16 June 2011.
44. The Members Statements of the Fund for the financial year ended 30 June 2010 recorded an account balance in respect of the Second to Fourth Respondents as follows:
  - 44.1. \$24,924.25 for the Second Respondent;
  - 44.2. \$50,830.12 for the Third Respondent; and
  - 44.3. \$51,502.52 for the Fourth Respondent.
45. The Members Statements were signed by the Second, Third and Fourth Respondents as directors of the Trustee of the Fund and dated 14 June 2011.
46. As at 30 June 2010 the Westpac Bank account of the Fund had a balance of \$12,352.24.

**As at 30 June 2011**

47. On or about 29 February 2012, the Income Tax and Regulatory Returns of the Fund in respect of the financial year ended 30 June 2011 were prepared by the Respondents' tax agent, Mr Lin B Chen of Powe Partners.
48. In the Income Tax and Regulatory Return of the Fund for the financial year ended 30 June 2011 ("the **2011 Return**"), the following information was returned:

- 48.1. the income of the Fund included gross interest of \$235 and gross trust distributions of \$248; and
- 48.2. the total assets of the Fund comprised \$122,559.00.
- 49. The 2011 Return was signed by the Third Respondent and lodged with the Commissioner on or about 29 February 2012.
- 50. The Members Statements of the Fund for the financial year ended 30 June 2011 recorded an account balance in respect of the Second to Fourth Respondents as follows:
  - 50.1. \$10,970.71 for the Second Respondent;
  - 50.2. \$21,857.03 for the Third Respondent; and
  - 50.3. \$22,139.58 for the Fourth Respondent.
- 51. The Members Statements were signed by the Second, Third and Fourth Respondents as trustees of the Fund and dated 27 February 2012.
- 52. As at 30 June 2011, the Westpac Bank account of the Fund had a balance of \$45,143.08.

**E. The Loans**

- 53. In the period June 2007 to June 2011 the Fund made a number of loans to George MacDonald & Sons and a loan to Vertu.
- 54. Set out in the table in Annexure "A" are the following details of the loans made by the Fund to George MacDonald & Sons:
  - 54.1. the date of the advance of funds;
  - 54.2. the amount advanced;
  - 54.3. the amount repaid; and
  - 54.4. an annotation of "1" or "2", the details of which are particularised in the key at the end of the table, where:
    - 54.4.1. "1" = the in-house assets acquired by the trustee of the Fund at a time the market value ratio of the fund's in-house assets exceeded 5%, for the purposes of section 83(2) of the Act; and
    - 54.4.2. "2" = the in-house assets acquired by the trustee of the Fund at a time the market value ratio of the fund's in-house assets did not exceed 5% but where that acquisition resulted in the market value ratio of the fund's in-house assets exceeding 5%, for the purposes of section 83(3) of the Act.
- 55. All of the loans made by the Fund to George MacDonald & Sons were on interest free terms. All of the funds loaned to George MacDonald & Sons were used to meet the shortages in working capital of the Business and to pay wages, referred to in paragraphs 15 to 16, above.
- 56. On 2 July 2007 the fund made a loan to Vertu. At the time the loan was made, it was at an interest rate of 8.5% per annum and repayable on demand. On 14 August 2009,



the directors of the First Respondent as trustee of the Fund made the following resolution:

Resolved that a request to repay the loan of \$2000.00 made to Vertu Pty Ltd be made. The total repayment to include [sic] interest calculated at 8.5% per annum. The total amount calculated to be \$2361 as at 14 August 2009.

57. The loan to Vertu was repaid on the date of this resolution with the amount of interest referred to in the resolution. Details of the loan, the interest charged, and the repayment of the loan are as follows:

Date	Amount loaned	Interest charged	Amount repaid
2/07/2007	\$2,000.00		
14/08/2009		\$361.00	
14/08/2009			\$2,361.00

58. The above loan to Vertu was an asset acquired by the trustee of the Fund at a time the market value ratio of the fund's in-house assets did not exceed 5% but where that acquisition resulted in the market value ratio of the fund's in-house assets exceeding 5%, for the purposes of section 83(3) of the Act.
59. The loans set out in the table in Annexure "A" above resulted in contraventions of the Act by the First Respondent:
- 59.1. each loan resulted in a contravention of:
- 59.1.1. section 62(1) of the Act (failing to ensure Fund maintained for prescribed purposes); and
- 59.1.2. section 109(1) of the Act (failing to deal with entity at arm's length);
- 59.2. each of the loans annotated "1" resulted in a contravention of section 83(2) of the Act (acquiring an "in-house asset" where the ratio of the value of in-house assets to the total value of assets of the fund (the "market value ratio") exceeds 5%); and
- 59.3. each of the loans annotated "2" resulted in a contravention of section 83(3) (acquiring an "in-house asset" if the market value ratio does not exceed 5%, but the acquisition would result in the market-value ratio of the fund's in-house assets exceeding 5%).
60. The loan to Vertu also resulted in contraventions of the Act by the First Respondent, as follows:
- 60.1. the loan resulted in a contravention of:
- 60.1.1. section 62(1) of the Act (failing to ensure Fund maintained for prescribed purposes); and
- 60.1.2. section 109(1) of the Act (failing to deal with entity at arm's length); and
- 60.2. the loan resulted in a contravention of section 83(3) (acquiring an "in-house asset" if the market value ratio does not exceed 5%, but the acquisition would result in the market-value ratio of the fund's in-house assets exceeding 5%).



#### F. Assets

61. The total assets recorded in the Fund Regulatory Tax Returns for each financial year were as follows:

<i>Year ended</i>	<i>Total Assets</i>
30 June 2007	\$141,448.00
30 June 2008	\$116,316.00
30 June 2009	\$97,913.00
30 June 2010	\$127,257.00
30 June 2011	\$122,559.00
<b>TOTAL</b>	<b>\$605,493.00</b>

#### G. Market value ratio

62. The ratio of the value of some of the in-house assets to the total value of assets of the fund (the "market value ratio") was, by way of example, as follows below. (The loans listed below were chosen on the basis that they are close to the end or the beginning of a financial year, thereby making it more accurate to use the amount of the total assets as at 30 June in the relevant year. Except for the first loan, the loans listed below are also some of the larger loans made by the Fund):

- 62.1. the loan of \$2,000 made by the Fund to Vertu on 2 July 2007: taking into account the then outstanding loan of \$5,300 to George MacDonald & Sons (Loan No.1 in Annexure "A"), and using the total value of assets as 30 June 2007 (see paragraph 61, above), the market value ratio was:

$$\frac{\$5,300 + \$2,000}{\$141,448} \times 100 = 5.16\%$$

- 62.2. the loan in the amount of \$10,840 made by the Fund to George MacDonald & Sons on 29 May 2008 (Loan No. 5 in Annexure "A"): using the total value of assets at 30 June 2008 (see paragraph 61, above), the market value ratio was:

$$\frac{\$10,800}{\$116,316} \times 100 = 9.32\%$$

- 62.3. the loan in the amount of \$13,565 made by the Fund to George MacDonald & Sons on 23 July 2009 (Loan No. 25 in Annexure "A"): using the total value of assets at 30 June 2009 (see paragraph 61, above), the market value ratio was:

$$\frac{\$13,565}{\$97,913} \times 100 = 13.85\%$$

- 62.4. the loan in the amount of \$12,995 made by the Fund to George MacDonald & Sons on 10 June 2010 (Loan No. 44 in Annexure "A"): using the total value of assets at 30 June 2010 (see paragraph 61, above), the market value ratio was:

$$\frac{\$12,995}{\$127,257} \times 100 = 10.21\%$$

62.5. the loan in the amount of \$13,945 made by the Fund to George MacDonald & Sons on 22 July 2010 (Loan No. 47 in Annexure "A"): using the total value of assets at 30 June 2011 (see paragraph 61, above), the market value ratio was:

$$\frac{\$13,945}{\$122,559} \times 100 = 11.38\%$$

62.6. the loan in the amount of \$16,415 made by the Fund to George MacDonald & Sons on 23 June 2011 (Loan No. 71 in Annexure "A"): using the total value of assets at 30 June 2011 (see paragraph 61, above), the market value ratio was:

$$\frac{\$16,415}{\$122,559} \times 100 = 13.39\%$$

#### H. Auditor Contravention Reports

63. An Auditor Contravention Report ("ACR") was for the following years lodged by the Fund's auditor with the Commissioner. Each ACR was also provided to the First Respondent.

##### 2007 income year

64. No ACR was lodged for the income year ended 30 June 2007.

##### 2008 income year

65. On 28 August 2009, the Fund's auditor lodged an ACR for the income year ended 30 June 2008. The ACR recorded a contravention(s) in the following terms:

Breach - section of the Act	Contravention	Amount
s. 82	The Fund lent \$2,000 to related entity and \$4,307.41 to employee (non-member) of related entity.	\$6,307.41

66. The ACR for the 2008 income year detailed the following response with respect to the question "describe any performed steps taken or planned steps to be taken to rectify the contraventions":

Loan repaid 14 August 2009 with interest by related entity. The Loan to employee was repaid 18 July 2008 with interest at market rate.

##### 2009 income year

67. On 10 November 2009, the Fund's auditor lodged an ACR for the income year ended 30 June 2009. The ACR recorded a contravention(s) in the following terms:

<b>Breach - section of the Act</b>	<b>Contravention</b>	<b>Amount</b>
s. 82	The Fund lent various amounts up to \$13,665 on (10) ten occasions during the year to a related entity. Each amount was repaid within (3) three weeks. All the loans were repaid as at 30 June 2009.	Various amounts up to \$13,665.00

68. The ACR for the 2009 income year detailed the following response with respect to the question "describe any performed steps taken or planned steps to be taken to rectify the contraventions":

All loans were repaid by 29 April 2009. The balance outstanding as at 30 June 2009 was less than 5% of the Fund assets. Interest (sic) at market will be paid by related entity to the Fund.

**2010 income year**

69. On 15 June 2011, the Fund's auditor lodged an ACR for the income year ended 30 June 2010. The ACR recorded a contravention(s) in the following terms:

<b>Breach - section of the Act</b>	<b>Contravention</b>	<b>Amount</b>	<b>Steps taken to rectify contravention</b>
s. 65	The Fund loaned various amounts up to \$13,825 to a related entity during the year.	Various amounts up to \$13,825.00	Repaid all outstanding balance by 24 May 2011.
s. 82	The Fund exceeded the 5% in-house assets ratio to related entity on nineteen occasions during the year. Each amount was repaid within two weeks.	\$12,995.00	Repaid the \$12,995.00 on 11 June 2010.
s. 62	The Fund continued to provide financial assistance to related entity in a manner which would breach the sole purpose of the Fund.		The trustee has given an undertaking to cease the lending practices to related party by 30 May 2011. The trustee has resolved to wind up the Fund and is

<i><b>Breach - section of the Act</b></i>	<i><b>Contravention</b></i>	<i><b>Amount</b></i>	<i><b>Steps taken to rectify contravention</b></i>
			currently arranging for rollovers by members to APRA regulated funds.
s. 109	Fund made various interest free loans to related entities. * You have selected that the trustee failed to make and maintain investments on an arm's length basis.	\$13,825.00	Trustee given undertaking to ceased lending activities to related entity by 24 May 2011.

70. The ACR for the 2010 income year noted the following:

The Fund continues to provide short-term finance to related party at non-commercial terms. The Fund also allows related party to deposit money into its bank account to cater for the wages payments of the related party. This is an incorrect use of the bank account facility of the Fund.

...

The trustee has given un (sic) undertaking to cease the lending to related party by 30 May 2011. It also resolved to terminate the Fund. At the time of this Report, the members are arranging to have their Funds rollover to APRA regulated funds.

#### **2011 Income year**

71. On 28 March 2012, the Fund's auditor lodged an ACR for the income year ended 30 June 2011. The ACR recorded a contravention(s) in the following terms:

<i><b>Breach - section of the Act</b></i>	<i><b>Contravention</b></i>	<i><b>Amount</b></i>	<i><b>Steps taken to rectify contravention</b></i>
s. 65	The Fund continued to provide financial assistance to related entity exceeding 5% in-house asset ratio in number of occasion [sic].	\$16,415.00	The Fund has ceased providing financial assistance to related entity as at 24 June 2011.
s. 82	The Fund exceeded 5% in-house asset ratio to related entity on	\$16,415.00	The last loan advanced was



<i>Breach - section of the Act</i>	<i>Contravention</i>	<i>Amount</i>	<i>Steps taken to rectify contravention</i>
	twenty occasions during the year.		repaid in full on 24 June 2011.
s. 62	The Fund continued to provide financial assistance to a related entity in a manner, which breached the sole purpose of the Fund. The Fund has been maintained for purposes other than core and ancillary purposes. The Fund must be maintained solely for core and ancillary purposes.		No further assistance was provided from 24 June 2011.
s. 109	The Fund provide financial assistance to related entity without charging interest for the loan.	\$16,415.00	All outstanding loans have been repaid but market rate was not charged.

#### **I. Letters from the Commissioner to the Fund**

72. On 14 October 2009, the Commissioner sent a letter to the Fund warning the trustee to rectify the contraventions identified by the auditor for the 2008 financial year, otherwise there might be consequences if the trustee failed to act.
73. On 15 March 2010, the Commissioner sent a letter to the Fund warning the trustee to rectify the contraventions identified by the auditor for the 2009 financial year, otherwise there might be consequences if the trustee failed to act.

#### **J. Notice of Non-compliance**

74. On 28 October 2011 a Notice of Non-Compliance was issued by the Commissioner to the Second and Third Respondents indicating that the Fund had lost its concessional tax treatment.
75. As a result of being declared to be non-complying, the Fund was assessed to tax as follows (which amounts were paid to the Australian Taxation Office ("ATO")):
  - 75.1. the 2008 year: the amount of \$63,253.95 was paid on 19 January 2012;
  - 75.2. the 2009 year: the amounts of \$1,200.39 and \$966.05 were paid on 19 January 2012 and the amount of \$234.34 was paid on 23 February 2012; and
  - 75.3. the 2010 year: the amount of \$1,201.09 was paid on 23 February 2012.

**K. Application of the loan funds**

- 76. The funds loaned from the Fund to George MacDonald & Sons were used to overcome working capital deficiencies in the Business, and in particular to pay salaries and wages to employees of the Business.
- 77. No amount of the funds loaned from the Fund to George MacDonald & Sons was applied to the personal benefit of the Second to Fourth Respondents other than the funds applied to pay their wages

**L. Summary of the key facts in relation to the loans constituting the contraventions**

- 78. A total of \$553,568.20 in loans were made by the Fund to George MacDonald & Sons and Vertu over the 4 year period from 25 June 2007 to 23 June 2011.
- 79. The amounts of each of the loans did not exceed \$20,000.
- 80. The average amount loaned was approximately \$7,768.
- 81. The loans to George MacDonald & Sons were unsecured and did not bear interest.
- 82. The loan to Vertu (made on 2 July 2007) was unsecured, at call and made on interest-free terms. However, on the date that a demand was made for repayment of the loan (14 August 2009), interest was also demanded. Both principal and interest were received on the same date by the Fund.
- 83. The period in which each loan was outstanding was relatively short; typically, several weeks. Each of the loans was ultimately repaid in full.

**M. The current position of the Fund and the First Respondent**

- 84. On 23 August 2011 the First Respondent as trustee of the Fund resolved to wind up the Fund and rollover the members' benefits to the Transport Industry Superannuation Fund (TISF), as follows:
  - 84.1. 2<sup>nd</sup> Respondent's benefits rolled over to the TISF: \$7,800
  - 84.2. 3<sup>rd</sup> Respondent's benefits rolled over to the TISF: \$16,000
  - 84.3. 4<sup>th</sup> Respondent's benefits rolled over to the TISF: \$16,000
- 85. The First Respondent's financial position, as at 30 June 2013, is:
  - 85.1. assets of \$Nil;
  - 85.2. liabilities of \$Nil and
  - 85.3. net equity of \$Nil.
- 86. For the financial year ended 30 June 2013, up to 30 June 2013, the First Respondent has made the following profit:
  - 86.1. revenue of \$Nil
  - 86.2. expenses of \$Nil
  - 86.3. profit of \$Nil

**N. Personal and financial circumstances of the Second, Third and Fourth Respondents**

87. A summary of the current financial circumstances of the Second Respondent, Brent Jameson, is as follows:
- 87.1. Total average weekly income of \$2,200 before tax;
  - 87.2. Total average weekly personal expenditure of \$1,215, including income tax;
  - 87.3. Total value of property owned by him of \$353,715; and
  - 87.4. Total liabilities of \$247,622.
88. A summary of the current financial circumstances of the Third Respondent, Erron Jameson, is as follows:
- 88.1. Total average weekly income of \$2,820 before tax, plus \$620 per week, which are the earnings of the Third Respondent's wife;
  - 88.2. Total average weekly personal expenditure of \$1,780, including income tax;
  - 88.3. Total value of property owned by him and his wife of \$660,520; and
  - 88.4. Total liabilities of him and his wife of \$376,000.
89. A summary of the current financial circumstances of the Fourth Respondent, Blaine MacDonald, is as follows:
- 89.1. Total average weekly income of \$2,400 before tax, plus \$500 per week, which are the earnings of the Fourth Respondent's wife;
  - 89.2. Total average weekly personal expenditure of \$1,420, including income tax;
  - 89.3. Total value of property owned by him and his wife of \$430,000; and
  - 89.4. Total liabilities of him and his wife of \$200,000.

**O. Contraventions**

***Contravention of s 62(1) by failing to ensure Fund maintained for prescribed purposes***

90. The First Respondent, as trustee of the Fund, admits that it contravened section 62(1) of the Act in that it failed to ensure that the Fund was maintained solely for one or more of the purposes prescribed in section 62(1), in that the First Respondent made the loans in **Annexure A** to these orders for the purpose of providing financial accommodation to George MacDonald & Sons Pty Ltd in order that George MacDonald & Sons Pty Ltd could overcome deficiencies in its working capital, and failed to obtain interest on the outstanding amount of the debt owed by George MacDonald & Sons Pty Ltd.
91. The First Respondent, as trustee of the Fund, admits that it contravened section 62(1) of the Act in that it failed to ensure that the Fund was maintained solely for one or more of the purposes prescribed in section 62(1), in that the First Respondent made a loan on interest free terms in the amount of \$2,000 in the year ended 30 June 2007 for the purpose of providing financial accommodation to Vertu Pty Ltd, although interest was ultimately demanded, and paid, in relation to this loan.



***Contravention of s 84(1) by breaching in-house asset rules***

92. The First Respondent, as trustee of the Fund, admits that it contravened section 84(1) of the Act by failing to take all reasonable steps to comply with section 83(2) of the Act, in that those loans listed in **Annexure A** to these orders and **annotated "1"** were loans made by the First Respondent, as trustee of the Fund, to George MacDonald & Sons Pty Ltd which increased the market value ratio of the Fund's in-house assets, which ratio was immediately prior to the making of each relevant loan already above the maximum market value ratio of 5% allowed under the Act.
93. The First Respondent, as trustee of the Fund, admits that it contravened section 84(1) of the Act by failing to take all reasonable steps to comply with section 83(3) of the Act, in that those loans listed in **Annexure A** to these orders and **annotated "2"** were loans made by the First Respondent, as trustee of the fund, to George MacDonald & Sons Pty Ltd which increased the market value ratio of the Fund's in-house assets, which ratio was not immediately prior to the making of each relevant loan already above the maximum market value ratio of 5% allowed under the Act, but which immediately after the making of each relevant loan was above the minimum market value ratio of 5% allowed under the Act.
94. The First Respondent, as trustee of the Fund, admits that it contravened section 84(1) of the Act by failing to take all reasonable steps to comply with section 83(3) of the Act, in that a loan made in the year ended 30 June 2007 by the First Respondent, as trustee of the fund, to Vertu Pty Ltd increased the market value ratio of the Fund's in-house assets, which ratio was not immediately prior to the making of each relevant loan already above the maximum market value ratio of 5% allowed under the Act, but which immediately after the making of each relevant loan was above the minimum market value ratio of 5% allowed under the Act.

***Contravention of s 109(1) by failing to deal with entity at arm's length***


95. The First Respondent, as trustee of the Fund, admits that it made investments in its capacity as trustee of the Fund in circumstances where the First Respondent and the other party to the transactions (namely, George MacDonald & Sons Pty Ltd) failed to deal with each other at arms length in respect of each transaction, and the terms and conditions of those transactions were more favourable to George MacDonald & Sons Pty Ltd than those which it is reasonable to expect would have applied if the trustee was dealing with George MacDonald & Sons Pty Ltd at arms length in the same circumstances, in contravention of s 109(1) of the Act, in that the First Respondent made the loans in **Annexure A** to these orders to George MacDonald & Sons Pty Ltd on interest-free terms.
96. The First Respondent, as trustee of the Fund, admits that it made investments in its capacity as trustee of the Fund in circumstances where the First Respondent and the other party to the transactions (namely, Vertu Pty Ltd) failed to deal with each other at arms length in respect of each transaction, and the terms and conditions of those transactions were more favourable to Vertu Pty Ltd than those which it is reasonable to expect would have applied if the trustee was dealing with Vertu Pty Ltd at arms length in the same circumstances, in contravention of s 109(1) of the Act, in that the First Respondent made the loan to Vertu Pty Ltd on interest-free terms, although interest was ultimately demanded, and paid, in relation to this loan.



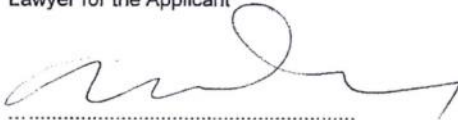
***Involvement of the Second, Third and Fourth Respondents in the contraventions***

97. The Second, Third and Fourth Respondents admit that, by section 194 of the Act, they contravened sections 62(1), 84(1) and 109(1) of the Act by reason of their involvement in the contraventions of those sections by the First Respondent in relation to the loans by the Fund to George MacDonald & Sons Pty Ltd, in that the Second, Third and Fourth Respondents were the directors and shareholders of the First Respondent and of George MacDonald & Sons Pty Ltd.
98. The Third Respondent admits that, by section 194 of the Act, he contravened sections 62(1), 84(1) and 109(1) of the Act by reason of his involvement in the contraventions of those sections by the First Respondent in relation to the loans by the Fund to Vertu Pty Ltd, in that the Third Respondent was a director and shareholder of Vertu.
99. Each of the Second, Third and Fourth Respondents have taken full responsibility for their contraventions of the Act and have expressed remorse and contrition for their conduct. Furthermore, each of the Second to Fourth Respondents has given assurances that he will never again engage in that conduct. Each of the Second to Fourth Respondents has also given these assurances on behalf of the First Respondent.
100. Each of the Respondents has cooperated fully with the Applicant's investigations and with the preparation of the documents relevant to this Proceeding.

Date: 30 July 2013



.....  
Matthew Walsh  
A lawyer employed by  
Australian Government Solicitor  
Lawyer for the Applicant



.....  
Timothy Daley  
Colin Daley Quinn Solicitors  
Lawyer for the First to Fourth Respondents.

## ANNEXURE "A"

Key:

Annotation	
1 =	The in-house assets acquired by the trustee of the Fund at a time the market value ratio of the fund's in-house assets exceeded 5%.
2 =	The in-house assets acquired by the trustee of the Fund at a time the market value ratio of the fund's in-house assets did not exceed 5% but where that acquisition resulted in the market value ratio of the fund's in-house assets exceeding 5%.

No. of loans	Date	Amount loaned	Amount repaid	Annotation
1.	25/06/2007	\$5,300.00		
	<b>Subtotals:</b>			
	<b>1/07/2006 to 30/06/2007</b>	<b>\$5,300.00</b>	<b>\$0.00</b>	
	6/07/2007		\$5,300.00	2
2.	9/08/2007	\$2,500.00		
3.	27/08/2007	\$2,500.00		
	28/08/2007		\$2,500.00	
4.	27/09/2007	\$2,500.00		
	27/09/2007		\$200.00	
	4/10/2007		\$100.00	
	11/10/2007		\$200.00	
	18/10/2007		\$100.00	
	25/10/2007		\$200.00	
	30/10/2007		\$2,500.00	
	1/11/2007		\$100.00	
	8/11/2007		\$200.00	
	15/11/2007		\$100.00	
	22/11/2007		\$200.00	
	29/11/2007		\$100.00	
	6/12/2007		\$200.00	
	13/12/2007		\$100.00	
	20/12/2007		\$100.00	
	27/12/2007		\$600.00	
5.	29/05/2008	\$10,840.00		2
	30/05/2008		\$10,840.00	
	<b>Subtotals:</b>			
	<b>1/07/2007 to 30/06/2008</b>	<b>\$18,340.00</b>	<b>\$23,640.00</b>	
6.	31/07/2008	\$1,000.00		
7.	4/08/2008	\$985.00		
	5/08/2008		\$1,000.00	
	5/08/2008		\$985.00	
8.	28/08/2008	\$10,030.00		2
	3/09/2008		\$10,030.00	

No. of loans	Date	Amount loaned	Amount repaid	Annotation
9.	4/09/2008	\$10,365.00		2
	22/09/2008		\$10,365.00	
10.	25/09/2008	\$13,335.00		2
11.	2/10/2008	\$7,000.00		1
	7/10/2008		\$13,335.00	
	7/10/2008		\$7,000.00	
12.	13/10/2008	\$5,000.00		
13.	16/10/2008	\$4,000.00		2
	20/10/2008		\$5,000.00	
	20/10/2008		\$4,000.00	
14.	23/10/2008	\$10,830.00		2
15.	27/10/2008	\$5,956.45		1
	30/10/2008		\$5,956.45	
	4/11/2008		\$10,830.00	
16.	22/01/2009	\$11,735.00		2
	28/01/2009		\$11,735.00	
17.	5/02/2009	\$13,665.00		2
	11/02/2009		\$13,665.00	
18.	26/02/2009	\$1,000.00		
	27/02/2009		\$1,000.00	
19.	26/03/2009	\$11,290.00		2
	31/03/2009		\$11,290.00	
20.	23/04/2009	\$2,419.00		
21.	23/04/2009	\$12,105.00		2
	29/04/2009		\$2,419.00	
	29/04/2009		\$12,105.00	
22.	25/05/2009	\$1,996.00		
	17/06/2009		\$1,996.00	
23.	24/06/2009	\$500.00		
	25/06/2009		\$500.00	
	<b>Subtotals: 1/07/2008 to 30/06/2009</b>	<b>\$123,211.45</b>	<b>\$123,211.45</b>	
24.	16/07/2009	\$2,000.00		
	20/07/2009		\$2,000.00	
25.	23/07/2009	\$13,565.00		2
	30/07/2009		\$13,565.00	
26.	6/08/2009	\$13,130.00		2
	11/08/2009		\$13,130.00	
	21/09/2009		\$12,500.00	
27.	24/09/2009	\$13,390.00		
	29/09/2009		\$890.00	
28.	14/01/2010	\$12,420.00		2
29.	18/01/2010	\$1,660.00		1
	19/01/2010		\$1,660.00	
	5/02/2010		\$12,420.00	
30.	11/02/2010	\$13,240.00		2
	18/02/2010		\$13,240.00	
	22/02/2010		\$13,000.00	
31.	22/02/2010	\$3,000.00		
	23/02/2010		\$3,000.00	

No. of loans	Date	Amount loaned	Amount repaid	Annotation
32.	25/02/2010	\$13,230.00		
	26/02/2010		\$230.00	
33.	4/03/2010	\$13,585.00		2
	9/03/2010		\$13,585.00	
34.	22/03/2010	\$2,000.00		
35.	22/03/2010	\$4,193.32		2
	25/03/2010		\$4,193.32	
	25/03/2010		\$2,000.00	
36.	25/03/2010	\$13,825.00		2
	31/03/2010		\$13,825.00	
37.	1/04/2010	\$2,190.45		
	7/04/2010		\$2,190.45	
38.	8/04/2010	\$8,000.00		2
39.	12/04/2010	\$1,650.00		1
	15/04/2010		\$8,000.00	
	15/04/2010		\$1,650.00	
40.	29/04/2010	\$12,570.00		2
	7/05/2010		\$12,570.00	
41.	10/05/2010	\$2,000.00		
	11/05/2010		\$2,000.00	
42.	27/05/2010	\$6,000.00		2
43.	27/05/2010	\$1,000.00		1
	31/05/2010		\$7,000.00	
44.	10/06/2010	\$12,995.00		2
	11/06/2010		\$12,995.00	
	<b>Subtotals: 1/07/2009 to 30/06/2010</b>	<b>\$165,643.77</b>	<b>\$165,643.77</b>	
45.	1/07/2010	\$12,000.00		2
	8/07/2010		\$12,000.00	
46.	15/07/2010	\$6,000.00		
	22/07/2010		\$8,000.00	
47.	22/07/2010	\$13,945.00		2
	17/08/2010		\$13,945.00	
	17/08/2010		\$6,000.00	
48.	17/08/2010	\$8,000.00		
49.	26/08/2010	\$12,040.00		2
	31/08/2010		\$12,040.00	
50.	23/09/2010	\$12,480.00		2
	30/09/2010		\$12,480.00	
51.	14/10/2010	\$4,000.00		
	21/10/2010		\$6,000.00	
52.	21/10/2010	\$13,930.00		2
	1/11/2010		\$13,930.00	
	1/11/2010		\$4,000.00	
53.	1/11/2010	\$6,000.00		
54.	4/11/2010	\$13,275.00		2
	8/11/2010		\$13,275.00	
55.	25/11/2010	\$13,745.00		2
	1/12/2010		\$13,745.00	
56.	23/12/2010	\$13,455.00		2



No. of loans	Date	Amount loaned	Amount repaid	Annotation
	17/01/2011		\$13,455.00	
57.	20/01/2011	\$1,000.00		
	21/01/2011		\$1,000.00	
58.	21/01/2011	\$200.00		
59.	24/01/2011	\$200.00		
	25/01/2011		\$400.00	
60.	27/01/2011	\$14,055.00		2
61.	27/01/2011	\$271.00		1
	1/02/2011		\$271.00	
	1/02/2011		\$14,055.00	
62.	10/02/2011	\$13,045.00		2
	11/02/2011		\$13,045.00	
63.	24/02/2011	\$12,640.00		2
64.	1/03/2011	\$462.00		1
65.	2/03/2011	\$620.00		1
	9/03/2011		\$12,640.00	
	9/03/2011		\$620.00	
	9/03/2011		\$462.00	
66.	10/03/2011	\$15,140.00		2
67.	11/03/2011	\$605.00		1
	14/03/2011		\$605.00	
	18/03/2011		\$15,140.00	
68.	24/03/2011	\$14,205.00		2
	7/04/2011		\$14,205.00	
69.	28/04/2011	\$12,345.00		2
	3/05/2011		\$12,345.00	
70.	5/05/2011	\$9,000.00		2
	6/05/2011		\$9,000.00	
71.	23/06/2011	\$16,415.00		2
	24/06/2011		\$16,415.00	
	<b>Subtotals:</b>			
	<b>1/07/2010 to 30/06/2011\$</b>	<b>\$239,073.00</b>	<b>\$239,073.00</b>	
	<b>TOTAL</b>	<b>\$551,568.22</b>	<b>\$551,568.22</b>	

**Schedule**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL**

**NO NSD 1523 OF 2012**

**Respondents**

Second Respondent	Brent Christopher Jameson
Third Respondent	Erron Douglas Jameson
Fourth Respondent	Blaine Kenneth MacDonald