




## ATO Interpretative Decision

ATO ID 2011/24

### Superannuation

### Self managed superannuation fund: waiver of disqualified person status - meaning of 'serious dishonest conduct'

FOI status: may be released

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## Issue

Is the offence committed by the member of the superannuation fund an offence involving 'serious dishonest conduct' for the purposes of section 126B of the *Superannuation Industry (Supervision) Act 1993* (SISA)?

## Decision

Yes. The offence committed by the member of the superannuation fund is an offence involving 'serious dishonest conduct' for the purposes of section 126B of the SISA.

## Facts

The member is a disqualified person within the meaning of subparagraph 120(1)(a)(i) of the SISA because he was convicted of an offence against the Commonwealth, being an offence in respect of dishonest conduct.

Under paragraph 20(1)(b) of the *Crimes Act 1914* (Crimes Act), the judge sentenced the member to imprisonment for a period that was more than two years, but ordered that he be released after he had served a specified period of his sentence upon giving security. The period of time that he spent in prison was less than two years.

## Reasons for Decision

An individual who is a disqualified person because he or she was convicted of an offence in respect of dishonest conduct may apply to the Commissioner for a declaration waiving his or her status as a disqualified person provided the offence was not one involving serious dishonest conduct.

Under paragraph 126B(2)(a) of the SISA, an offence involves serious dishonest conduct if 'the penalty actually imposed for the offence is a term of imprisonment of at least 2 years'.

An order under paragraph 20(1)(b) of the Crimes Act is called a 'recognisance release order' (see definition of 'recognisance release order' under section 16 of the Crimes Act). A recognisance release order enables a sentencing court to impose a term of imprisonment on the offender but to direct, by order, that the offender be released after a specified period upon the person giving security. The order for release is part of a composite sentence and operates as a qualification or condition upon the sentence of imprisonment imposed ( *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 ( *Drake* ) at 416).

In *Drake*, the Full Court of the Federal Court considered a recognisance release order in relation to a provision of the *Migration Act 1958*. This provision stated that the Minister could order the deportation of a non-citizen 'convicted in Australia of any...offence for which he has been sentenced to imprisonment for one year or longer...'

The Full Court stated that the words of the provision must be construed in the context of the section in which they appear. Because the making of a deportation order can involve drastic interference with the liberty of an individual, the powers conferred upon the Minister by the section should be strictly construed. In this context they argued that the fact that the magistrate directed that the plaintiff be released upon recognisance after having served three months did not alter the fact that the magistrate determined that the appropriate sentence to be imposed for the offence was a term of imprisonment of one year ( *Drake* at FLR 418).

Section 126B (and associated provisions) was inserted into the SISA to allow the Commissioner to waive the disqualified person requirements for a trustee if he believes that the individual is highly unlikely to be a prudential risk to a superannuation entity; for example, an individual whose only offence was a minor offence involving dishonesty, such as shoplifting, 20 years ago (Explanatory Memorandum for the Superannuation Industry (Supervision) Legislation Amendment Bill 1995, schedule 4, item 52). An individual is not eligible to apply for a waiver unless the offence that he or she has committed meets the conditions at subsection 126B(2) of the SISA. Other factors, such as the length of time since committing the offence, are only considered by the Commissioner if the individual is eligible to apply (subsection 126D(1A) of the SISA).

Hence, the gravity of the offence is the most important factor in determining if an individual is a prudential risk to a superannuation fund. In this context, the phrase 'penalty actually imposed for the offence' for the purposes of paragraph 126B(2)(a) of the SISA means the term of imprisonment that the court considers to be appropriate for the offence rather than the actual period of time that the offender spends in prison.

The use of the word 'actually' is not inconsistent with this interpretation. We consider that the word is inserted in the phrase in order to convey the real or actual penalty that the sentencing court imposed on the offender as distinct from the maximum penalty that could have been imposed under the penalty provision attached to that offence. It does not refer to the actual period of time that the offender spends in prison.

In this case, the sentencing court considered a term of imprisonment of more than two years to be the appropriate penalty to be imposed for the offence irrespective of the court's direction that the member be released upon recognisance. Thus the penalty actually imposed for the offence was a term of imprisonment of more than two years.

The offence committed by the member of the superannuation fund was an offence involving 'serious dishonest conduct' for the purposes of section 126B of the SISA.

**Date of decision:** 8 March 2011

**Legislative References:**

*Superannuation Industry (Supervision) Act 1993*

section 126B

subsection 126B(2)

subparagraph 120(1)(a)(i)

*Crimes Act 1914*

paragraph 20(1)(b)

**Case References:**

*Drake v. Minister for Immigration and Ethnic Affairs*

(1979) 46 FLR 409

**Other References**

Explanatory Memorandum for the Superannuation Industry (Supervision) Legislation Amendment Bill 1995, schedule 4, item 52

**Keywords**

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