

October 17th 2016

Submission to the Review into Dispute Resolution and Complaints Framework

In September 2009, the Australian Securities and Investment Commission (ASIC) were alerted that the Astarra Strategic Fund (ASF) and the Trio Capital Limited (Trio) - a superannuation fund Trustee and Responsible Entity for a number of managed investment schemes (MISs) including the ASF,¹ may be a Ponzi scheme. ASIC froze the fund then Trio's operating licences were cancelled. Altogether 6,090 investors were affected.

The Superannuation Industry (Supervision) Act 1993 (SIS Act) offers 'fraud' protection to the Australian Prudential Regulatory Authority (APRA) regulated funds but the protection does not apply to self-managed or direct investors. In April 2011 the Minister of Superannuation enacted Part 23 of the SIS Act to compensate the 5,400 investors in the APRA regulated funds exposed to a financial crime. The 690 investors, of which 415 were direct investors and around 285 investors were in self managed superannuation funds (SMSFs)² were not covered by the SIS Act. Once the Part 23 of the SIS Act compensated the majority of the investors, there was no reason for a proper investigation into the disappearance of the money or to follow the money trail. Some of the key overseas entities were not questioned. Subsequently, the self-managed and direct investors saw that justice was not carried out and that all avenues for legal recourse were fruitless, thus the formation of Victims of Financial Fraud (VOFF Inc).

The 2011-2012 Parliamentary Joint Committee inquiry into the collapse of Trio Capital, was thought to have addressed the concerns of the traumatised victims. Some of the victims were naïve to think that the PJC would investigate the crime thoroughly. It is now understood that ASIC did not provide the PJC with important evidence. ASIC never informed the victims that they could provide a 'Victims Impact Statement' to the court. Rather than the victims of a crime be recognised as victims, the self-managed investors were referred to in the media as swimming 'outside the flags'. Some of the comments against self-managed investors mirrored a turf war with the Trio victims at the bottom of the hierarchy and vested interests in the 25 billion dollar per year financial service industry behind some of the comments.

¹ Financial System Inquiry: Submission by the Australian Securities and Investments Commission April 2014 page 192

² *Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital May 2012*

Most of the 5 years of information about the operation of Trio is held by ASIC and APRA. Information that is not publicly available as it is protected under confidentiality legislation. Neither regulator has disclosed information about their actions / inactions, meaning that consumers can not see ASIC and APRA's processes or interaction procedure.

One of the restricted documents is an account of how the fraud occurred and APRA relied on this account to enact the compensation for the APRA regulated funds. However, this same information is denied to the uncompensated victims. This gives the impression APRA provide a selective service. The uncompensated victims found that if information about the fraud is unavailable a private investigator's cost would be prohibitive.

The uncompensated victims did try many options for compensation / restitution. In 2012 the PJC recommended in its Report that self-managed super funds *'would be required to pursue compensation for fraud via a professional indemnity insurance claim against the Australian Financial Services Licence, on whose advice they relied.'*³

This turned out to be an inappropriate option because the PI insurance cover is only a fraction of the overall losses experienced by investors and 'fraud' renders the PI insurance null-and-void.

The uncompensated investors sought legal advice about running a class action, but was considered too costly and with no guarantee to find any monies.

The Financial Ombudsman Service (FOS) and the Superannuation Complaints Tribunal (SCT) also proved fruitless because their mechanisms could not retribute or compensate the substantial losses incurred in by the loss of victims retirement savings.

The Trio scheme exploited weaknesses in the Australian financial system, requiring legislative reform and regulatory enhancements to the Australian Prudential Regulation Authority Act 1998; The Australian Securities and Investments Commission Act 2001; The Superannuation Industry (Supervision) Regulations 1994 and The Corporations Act 2001. Additionally as a direct result of the Trio fraud, the Serious Financial Crime Taskforce (SFCT) was established. Despite the need to fix legislative inadequacies, the victims who were exposed to the fraud were met with nonsense comments such as swimming 'outside the flags' which incorrectly inferred that the investors were outside regulatory requirements.

³ *Ibid*

The Financial System Inquiry, Chaired by David Murray (Murray Report) in 2014 noted that, *'Given superannuation is both compulsory and a tax-preferred long-term savings vehicle, Government has a clear role in defining the system's objectives'*.⁴

Mr Murray also recommended, *'the government should seek broad agreement on the following primary objective for the superannuation system:'*

*'To provide income in retirement to substitute or supplement the Age Pension.'*⁵

Four years earlier the High Court of Australia had said similarly, *'Because of the potentially lengthy time periods over which superannuation savings are accumulated, it was natural, and it is now in many instances mandatory, for a trust mechanism to be employed. These funds have increasingly come under detailed statutory regulation. The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully'*.⁶

Concerning the Trio scheme, the regulators did not ensure that superannuation operates efficiently and lawfully when it provided unfit persons with an Australian Financial Service licence to manage Australian superannuation. ASIC acknowledge that, *'competition has the potential to drive down costs and drive up service standards'*⁷ but ASIC did nothing to correct the title of one of its own publications called 'swimming between the flags' when it was used in the media by the then Superannuation Minister in 2011 to disingenuously suggest the uncompensated investors were 'swimming outside the flags'.

The citizens of Australia deserve an independent correct and intelligent report of any financial crime in the Australian financial market so consumers can make informed decisions when deciding where and how to invest their savings. A crime scene should not be politicized or compromised by vested interests and the victims of financial crime should not be gagged by a clause in the SIS Act that favours the APRA regulated funds only.

The review panel may be aware that, *"the Government considered the action taken by the financial regulators, ASIC and APRA, and is satisfied that in relation to the collapse of Trio, both regulators carried out their roles and responsibilities appropriately, in accordance with the law and the regulatory framework"*.⁸

⁴ Financial System Inquiry Final Report November 2014 (Murray Report) page 98

⁵ Murray Report op. cit. page 95

⁶ Finch v Telstra Super Pty Ltd [2010] HCA 36 20 October 2010 M5/2010

⁷ Financial System Inquiry: Submission by the Australian Securities and Investments Commission April 2014 p 8

⁸ Media Release Government decision on financial assistance relating to the collapse of Trio Capital 1 April 2016 <http://kmo.ministers.treasury.gov.au/media-release/032-2016/>

However, Australian citizens are shut out of understanding the government's process in how it arrived at its decision about a financial crime when no details are made publicly available. Citizens that lost their life savings would like to know what evidence the regulator's self-reporting provided to the government for the government to be satisfied that both regulators carried out their roles and responsibilities appropriately.

VOFF acknowledge that the issues raised in this submission may not met the review panel's Terms of Reference but nevertheless the issues need to be raised.

VOFF continues its fight for justice.

Yours sincerely,
John Telford



Secretary VOFF