

Australian Prudential Regulation Authority

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Sydney NSW 2001



APRA Ref no. 14/002748

Your Ref no. 216

8 September 2014

Dear [REDACTED]

Request for information under the *Freedom of Information Act 1982*

I refer to your request dated 31 Jul 2014, in which you sought access under the *Freedom of Information Act 1982* to copies of:

'216. Please provide documentation held by APRA that supports either of these claims in relation to the Trio Capital fund in January 2008 to July 2009.

- a) *Mr Ripoll said it is "abundantly clear" that SMSFs had no protection (PJC Inquiry 22/09/2011).*
- b) *Senator Sherry found nothing to indicate "in any way, shape or form than an SMSF is not compensated in the event of theft and fraud" (PJC Inquiry 4 April 2012).'*

Better dated 11 August 2014, APRA consulted with you in accordance with sections 15 and 24 of the FOI Act.

By email dated 17 August 2014, you revised your request to:

'216. Prior September 2009 the ATO and ASIC did not have available on their web sites the information that they now display information that SMSFs are not protected in the event of fraud. Prior to September 2009 SMSF trustees were expected to have this knowledge. Information about Section 23 of the SIS Act was not in ASIC and ATO literature concerning manuals for running your own super fund.

In this context Senator Sherry's statement is more accurate when he said he found nothing to indicate "in any way, shape or form that an SMSF is not compensated in the event of theft or fraud" (PJC Inquiry 4 April 2012).

While ASIC and APRA now point to what is currently available, neither regulator has acknowledged what was actually the matter-of-fact prior September 2009. Please provide document that informed APRA (and meant to inform market) of Section 23 of the SIS Act in the period prior September 2009. We only seek one document. We don't want electronic files. We do not seek emails, we do not seek any other form of data or information outside the action plan document. We expect this report is no more than several pages. We do not want personal details. We do not seek company names.'

This amended request is the subject of the attached decision.

Notice of decision

I attach a notice of decision with statement of reasons. The statement of reasons sets out your rights of review.

Please contact me on 02 9210 3156 or foi@apra.gov.au if you have any queries.

Yours sincerely



Hannah Cole
Senior APRAinfo Officer
Australian Prudential Regulation Authority

**NOTICE OF DECISION MADE UNDER SECTION 23
OF THE FREEDOM OF INFORMATION ACT 1982 (the FOI Act)
WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

Applicant: Mr Paul Matters

Decision-maker: Hannah Cole, an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of section 23(1) of the FOI Act.

Relevant documents: The document that informed APRA (and meant to inform market) of section 23 of the SIS Act in the period prior September 2009.

My decision: Grant access to the document in the Schedule.

MATERIAL FACTS

1. By email dated 31 July 2014, the Applicant requested:

'216. Please provide documentation held by APRA that supports either of these claims in relation to the Trio Capital fund in January 2008 to July 2009.

- a) Mr Ripoll said it is "abundantly clear" that SMSFs had no protection (PJC Inquiry 22/09/2011).*
- b) Senator Sherry found nothing to indicate "in any way, shape or form than an SMSF is not compensated in the event of theft and fraud" (PJC Inquiry 4 April 2012).'*

2. By letter dated 11 August 2014, APRA consulted with the Applicant in accordance with sections 15 and 24 of the FOI Act.

3. By email dated 17 August 2014 the Application revised the request to:

'216. Prior September 2009 the ATO and ASIC did not have available on their web sites the information that they now display information that SMSFs are not protected in the event of fraud. Prior to September 2009 SMSF trustees were expected to have this knowledge. Information about Section 23 of the SIS Act was not in ASIC and ATO literature concerning manuals for running your own super fund.

In this context Senator Sherry's statement is more accurate when he said he found nothing to indicate "in any way, shape or form that an SMSF is not compensated in the event of theft or fraud" (PJC Inquiry 4 April 2012).

While ASIC and APRA now point to what is currently available, neither regulator has acknowledged what was actually the matter-of-fact prior September 2009. Please provide document that informed APRA (and meant to inform market) of Section 23 of the SIS Act in the period prior September 2009. We only seek one document. We don't want electronic files. We do not seek emails, we do not seek any other form of data or information outside the action plan document. We expect this report is no more than several pages. We do not want personal details. We do not seek company names.'

This amended request (the request) is the subject of the decision.

EVIDENCE AND MATERIAL RELIED ON

4. In making my decision, I have relied on the following evidence and material:
- a) the Applicant's request received by APRA on 31 July 2014;
 - b) letter from FOI Officer to the Applicant dated 11 August 2014;
 - c) email from Applicant to FOI Officer dated 17 August 2014;
 - d) Document set out in the attached Schedule;
 - e) relevant sections of the *Superannuation Industry (Supervision) Act 1993*;
 - f) Relevant sections of the *Freedom of Information Act 1982*; and
 - g) Guidelines issued by the Office of the Australian Information Commissioner to date.

REASONS FOR DECISION

5. I do not consider that any exemptions or conditional exemptions in the FOI Act apply to the document in the Schedule. Therefore I have decided to grant access to the document in the Schedule.

COMPLAINTS TO THE INFORMATION COMMISSIONER

6. You may complain to the Commissioner concerning action taken by this agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Commissioner will conduct a completely independent investigation of your complaint.
7. You may complain to the Commissioner either orally or in writing, by any of the methods below.
 - Telephone: 1300 363 992
 - email: enquiries@oaic.gov.au
 - GPO Box 2999, Canberra ACT 2601
 - website at www.oaic.gov.au



Hannah Cole
Australian Prudential Regulation Authority

Date: 8 september 2014 .

Schedule of Documents - Freedom of Information

Mr Paul Matters - A document that informed APRA (and meant to inform market) of Part 23 of the SIS Act in the period prior September 2009.

	Description of document	Release/ Non-release
1	Part 23 of the <i>Superannuation Industry (Supervision) Act 1993 Superseded</i> (effective date 1 July 2009).	Release



Superannuation Industry (Supervision) Act 1993

Act No. 78 of 1993 as amended

This compilation was prepared on 17 July 2009
taking into account amendments up to Act No. 54 of 2009

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 23—Financial assistance to certain funds

Division 1—Preliminary

227 Object of Part

The object of this Part is to make provision for the grant of financial assistance for certain superannuation entities that have suffered loss as a result of fraudulent conduct or theft.

228 Interpretation

In this Part:

eligible loss means a loss suffered by a fund as a result of fraudulent conduct, or theft, but does not include an amount that the fund did not receive because of the failure of a person to pay contributions to the fund.

levy means the levy imposed by the *Superannuation (Financial Assistance Funding) Levy Act 1993*.

229 Application for assistance

(1) If:

- (a) a fund suffers an eligible loss after the commencement of this Part; and
- (aa) at the time it suffers the loss, the fund is:
 - (i) a regulated superannuation fund (other than a self-managed superannuation fund); or
 - (ii) an approved deposit fund; and
- (b) the loss has caused substantial diminution of the fund leading to difficulties in the payment of benefits;

a trustee of the fund may apply to the Minister for a grant of financial assistance for the fund.

(2) The application must be in writing and be accompanied by such information as the Minister determines.

Section 230

- (3) To avoid doubt, an application may be made under this section by a trustee of a self-managed superannuation fund as long as the fund met the requirements in subsection (1) at the time the fund suffered the loss to which the application relates.

230 Minister may request additional information

- (1) The Minister may request a trustee of the fund to give such additional information as the Minister considers necessary to enable the application to be determined.
- (2) The Minister may, by signed instrument, delegate the Minister's power under subsection (1) to an SES employee, or acting SES employee, in the Department.
- (3) In exercising a power delegated under subsection (2), a delegate must comply with any directions of the Minister.

230A APRA to advise Minister in relation to application for assistance

- (1) The Minister must make a written request to APRA for advice in relation to the application. The request may specify:
- (a) particular matters that APRA is to provide advice about; and
 - (b) a time by which the advice must be provided.
- (2) APRA must comply with the request and may, in its advice, also address any other issues that APRA considers relevant to the determination of the application.
- (3) The Minister's written request to APRA made under subsection (1) for advice in relation to the application for assistance must be laid before each House of the Parliament as soon as practicable after the Minister has made a written determination under subsection 231(1).
- (4) The Minister may, by signed instrument, delegate the Minister's function under subsection (1) to an SES employee, or acting SES employee, in the Department.
- (5) In exercising a function delegated under subsection (4), a delegate must comply with any directions of the Minister.

Division 2—Determination of applications for financial assistance

231 Minister may grant financial assistance

- (1) If, after considering the application, any additional information given by a trustee of the fund, and APRA's advice under section 230A, the Minister is satisfied that the fund has suffered an eligible loss as mentioned in subsection 229(1), the Minister is to determine in writing:
 - (a) whether the public interest requires that a grant of financial assistance should be made to a trustee of the fund for the purposes of restoring the loss; and
 - (b) if so, the amount of the assistance.
- (2) Financial assistance payable to a trustee of a fund is to be paid in such amounts, at such times, and in such manner, as the Minister determines.
- (3) To avoid doubt, the Minister may grant financial assistance to a self-managed superannuation fund under this section as long as the fund met the requirements in subsection 229(1) at the time the fund suffered the loss to which the assistance relates.
- (4) The Consolidated Revenue Fund is appropriated for the purposes of making payments of financial assistance granted under this section.
- (5) Amounts appropriated under this section are not to be credited to the Australian Prudential Regulation Authority Special Account.

232 Maximum amount of financial assistance

The amount of financial assistance to be granted to a trustee of a fund in respect of the fund must not be greater than the amount that the Minister determines to be the eligible loss suffered by the fund.

233 Financial assistance to be subject to conditions

- (1) The payment to a trustee of a fund of a grant of financial assistance is subject to the following conditions:

Section 233

- (a) a condition that the amount of financial assistance granted will be deposited in the corpus of the fund;
 - (b) a condition that the amount will be applied, within a period determined by the Minister:
 - (i) in making payments to persons who were beneficiaries in the fund at the time the fund suffered the eligible loss; or
 - (ii) for the benefit of those persons in such other manner as the Minister approves in writing;
 - (c) a condition that a trustee of the fund will prepare and give to the Minister such reports on the application of the amount as are required by the Minister;
 - (d) such other conditions (if any) as the Minister determines and notifies in writing to a trustee of the fund.
- (2) Despite any law of the Commonwealth, a State or a Territory, whether written or unwritten, or any provision of a trust deed or other rules according to which a fund is administered:
- (a) a trustee of a fund must comply with a condition mentioned in paragraph (1)(b); and
 - (b) the trustee does not contravene the law, trust deed or rules by complying with such a condition.

Division 3—Repayment of financial assistance

238 Financial assistance to be repaid in certain circumstances

- (1) The trustee, or the trustees, of a fund for which a grant of financial assistance has been made are liable to repay to the Commonwealth the amount of the financial assistance or such part of that amount as the Minister determines if:
 - (a) a condition to which the grant of the financial assistance was subject has been contravened; or
 - (b) the grant of the financial assistance is subject to a condition that a particular event does not occur and that event has occurred.
- (2) The Minister is to determine the manner in which repayments of financial assistance are to be made.
- (3) If the trustee, or the trustees, of a fund are liable to pay an amount to the Commonwealth under subsection (1), the Commonwealth may recover the amount as a debt.

239 Minister may remit liability

The Minister may remit the whole or a part of the liability of a trustee of a fund under section 238.

240 Repayable grant to have priority over other debts

Despite any other law of the Commonwealth or any law of a State or Territory, an amount payable to the Commonwealth by a trustee of a fund under section 238 has priority over all other debts (whether preferential, secured or unsecured).