

Victims of Financial Fraud  
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To the Office of the Australian Information Commissioner (OAIC)

OAIC Ref: MR16/00051

Dear Information Commissioner,

Thank you for your letter to Victims of Financial Fraud (VOFF Inc) dated December 1<sup>st</sup> 2016 concerning the review of a Freedom of Information (FOI) decision (Ref: MR16/00051) by the Australian Prudential Regulatory Authority (APRA).

VOFF FOI request to APRA started as numbers 408, 409, 411 and 412. These were then batched as one and over proceeding months they underwent revision, two were closed, leaving 409 and 412 remaining. The decision in question affects the release of information as identified by 409 and 412, information about the Trio Capital Limited (Trio) and the Astarra Strategic Fund (ASF) fraud. More specifically, No 409 sought copy of the complaints APRA received about Trio / ASF and 412 sought APRA's fit and proper person test of the Trio entities.

The initial 4 FOIs were lodged Nov 7<sup>th</sup> – Nov 15<sup>th</sup> 2015, these were batched, then APRA refused to proceed under subsection 24AB(2). Right from the beginning APRA reminded VOFF of s38 of the FOI Act that disclosure is prohibited under a provision of an enactment and that subsection 56(11) of the APRA Act expressly applies section 38 of the FOI Act so that any document that is a 'protected document' or contains 'protected information' within the meaning of subsection 56(1) of the APRA Act is also an exempt document under section 38 of the FOI Act.

VOFF's persistence led to FOI 408 eventually being released. This turned out to be a 4 page publicly available document. The FOI Act does not regard a publicly available document to fall within the definition of an FOI document. Therefore FOI No 408 should not have been initially blocked or threatened to be blocked by s56 of the APRA Act / s38 of the FOI Act.

The IC letter (Dec 1<sup>st</sup> 2016) to VOFF (page 3) refers to the document we seek, *'I have reviewed an unredacted copy of the documents.'* This is VOFF's first indication that the document exists. One of the earlier reasons used by APRA to refuse the release of information was due to the substantial diversion of resources with an estimated total processing time for FOI requests 409 and 412 as 488.83 hours. The request was tailored to capture less and reduce workload. The IC also point out in same letter, *'It is clear the documents were given to APRA, or produced by them, for the purposes of performing functions under the APRA Act or the Superannuation Industry (Supervision) Act 1993. Trio Capital Limited (in liq) (formerly known as Astarra Capital Limited) is a financial sector entity. The documents are not otherwise publicly available.'*

Stating documents are exempt that were produced for the purpose of APRA to perform its regulatory functions under the APRA Act, can apply to every single document in APRA's keeping. The unredacted documents that may show the type of complaint made about Trio and also show whether APRA's fit and proper person test is an effective tool or if APRA needs greater powers, questions that the public will be better served if the documents are made publicly available.

APRA's compliance with the APRA Act, in the case of Trio, can be seen as protecting a scheme that Justice Garling in the Supreme Court of New South Wales in 2011 identified as being a fraudulent scheme. APRA are protecting the confidentiality of the ASF Managed Investment Scheme (MIS) well after the fund and people who created it have dispersed after making \$194.5m disappear. APRA are forced by their compliance of the APRA Act to be the fraudsters' ally and of no help to the financial security health of the public. APRA's power to refuse information is tied up intentionally or unintentionally, with destroying market competition. Trio offered APRA the opportunity to showcase APRA's own regulated funds as the safe investment option while highlighting the damage done to self-managed funds and other form of investment as dangerous.

This letter is not the place to provide evidence to show that since the Trio fraud was uncovered (Sept 2009) the government has actively discouraged self-managed funds through the media. Articles warn about the rising dangers, hefty fines against trustees if they don't comply, that self-managed funds (SMSFs) are a giant train wreck about to happen and the dangers of property spruikers. Out of all the fear generated by such articles, not a single suggestion offering security improvements. Reports that highlight the dangers without offering fixes or discussion raise questions about fair market competition.

It is public knowledge that the government has its eye on the nearly two trillion dollars superannuation pool, suitable for investing into large-scale projects. APRA can become the one-stop superannuation regulator by discouraging democratization of superannuation and by discouraging investment choice (Trio is prime example).

In the meantime VOFF members who are non-APRA regulated investors are up against unfair competition in VOFF's attempt to access information about the fraud. The Trio fraud deceived about 6,0902 Australian citizens, deceived the financial regulators, two banks, deceived one of the biggest auditing firms in the country and deceived about 150 financial advisors. The Australian government has not measured or gauged the destructive carnage, the monetary or emotional toll caused by the international financial predators who entered the Australian financial market unchallenged and pillaged retirement savings.

Without an accurate account of the frauds' destruction, it is understandable that the IC's letter on page 4 says, *'under s 54W(a)(i) of the FOI Act, the IC may decide not to undertake a review if satisfied that the review application is lacking in substance.'*

*On the basis of the following information before the Oaic, your application for IC review is lacking in substance:*

The IC points out,

*· You have not raised a ground that discloses any error in APRA's finding that the documents you requested are protected documents or documents that contain protected information for the purposes of s 56 of the APRA Act.*

*· You have not raised a valid ground to review APRA's decision that the documents within the scope of your request are exempt under s 38 of the FOI Act because they are protected documents or documents that contain protected information (s 56(11) of the APRA Act).*

*Accordingly, the intention is to finalise your application for IC review under s 54W(a) of the FOI Act unless you provide reasons to reconsider our view of the matter.'*

VOFF members lost about \$54m (AUD). Research in 2006 notes that blue-collar crime in the United States costs roughly \$14 billion every year while white-collar crime costs roughly about 200 billion each year.<sup>1</sup> The consequences of fraud is also understood, such as the ripple effects on blue-collar crimes are small and generally contained to the family unit, but the impact from white-collar crime is much more widespread.<sup>2</sup> There should be no question as to the impact on the Trio victims, even when the issue has not been fully investigated.

In addition to the monetary loss suffered by VOFF members, is heartache and anger at discovering personal retirement savings were plundered. Despite this the IC can decide not to undertake an IC review, or not to continue to undertake an IC review, if:

(a) the IC is satisfied of any of the following:

(i) the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;

White-collar crime is recognised to be 14 times more damaging than all other forms of crime, yet the Trio victims must prove they are not being frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

According to Professor William Black, CEO's who use a company as a fraud vehicle are able to cause greater losses than all other forms of property crime combined. Black points out that such CEO's are regarded as "financial super-predators".<sup>3</sup>

How could seeking information about a financial crime be regarded as frivolous? It is in the victim's and public interest to learn of the number of complaints made to APRA about ASF. It is also in the victim's and public interest to learn what APRA did or did not do concerning a fit and proper person test of the Trio entities. APRA's mistake in complying with the FOI Act legislation highlights why the IC needs to review APRA's FOI decision to rule out further mistakes.

The IC asks whether our request for a review of APRA's decision is '*lacking in substance*'. Justice Garling's Supreme Court of NSW judgment is not lacking in substance where he declares, *Canadian Shawn Darrell 'Richard's conduct was manifestly dishonest. Mr Richard is guilty of serious crimes of a high order. They were carefully considered and planned, they were concealed, they continued over a period of nearly four years and they led to significant financial losses in excess of \$26m. Mr Richard knew that what he was doing was dishonest, that he was providing misleading information...*'<sup>4</sup>

Request for information regarding a serious crime is not something that can be likened to 'lacking in substance'. If the issue were street crime, the question of '*lacking in substance*' would not be raised. It is well documented that white-collar crime (such as Trio) receives relative inattention in the media compared with street crime. The average amount lost to street crime and white-collar crime shows there is no lacking in substance:

- Fraud is about \$1,000,000 ("The Marquette Report," 2009);
- Street robbery entails losses of \$1,032;
- Gas station robbery entails losses of \$1,007;
- Convenience store robbery entails losses of \$712 (Federal Bureau of Investigation, 2009b).<sup>5</sup>

Victims of street crime didn't trust the stranger who robbed them in the first place. Whereas the victims of white-collar crime, in addition to the other losses incurred from the victimization, have their trust violated by the offender.<sup>6</sup> In the case of the Trio / ASF fraud, superannuation in Australia is mandated, encouraged by the government and supported with tax benefits, so the victims trusted ASIC and APRA to do their job and that trust was also violated.

By not releasing information about the fraud, APRA prevent evidence-based information from being able to build an accurate account of what happened. By denying access to information APRA is creating secrets. It is well understood that secrecy breeds corruption, while openness and transparency breed Liberty. Frauds thrive on deception and secrecy.

The international brokers listed on the ASIC generated Trio company documents, when they applied for licenses to operate in the Australian financial market, some had previous convictions for breaching United States financial security laws or had owned / operated troubled companies that were forced to close by regulatory authorities, but despite the criminal past, the Australian regulators granted licenses knowing that Trio operated a managed investment scheme that handled retirement savings and superannuation. APRA's refusal to provide information is leading Australian investors into the hands of the fraudsters.

## **VOFF call for a review by the IC of APRA's decision on the following grounds:**

1. APRA's mistake in using legislation
2. Denies victim's rights under the Victims of Crime Act 1994 (the Act).
3. Public interest test
4. APRA's conflict of interest
5. ASIC and APRA services are based on Trust

### **1. APRA's mistake in using legislation.**

As mentioned above, APRA cited s56 of the APRA Act / s38 of the FOI Act to refuse the release of a document when in fact the document turned out to be a publicly available document. Through persistence with the FOI request VOFF become aware of this mistake. APRA's mistake raises the question, what other administrative errors did APRA make?

The information VOFF seeks is inextricable entwined into our own personal stories of suffering, marriages that fell apart, dreams shattered and as a direct result of the Trio fraud, lives lost by suicide. It is imperative that errors can be ruled out. VOFF want to check the complaints APRA received about Trio, and about whether APRA carried out a fit and proper person test of the Trio entities.

There is another example where APRA's reliance on legislation is perplexing. For example, under s56 of the APRA Act, the Trio victims are refused information because they are deemed an APRA fund. Section 56 of the APRA Act states that a *"body regulated by APRA" includes a body that has at any time been a body regulated by APRA.*

APRA did regulate self-managed funds before the Australian Tax Office took over.

On the other hand, the same victims are denied government assistance under Part 23 of the SIS Act because they are not APRA regulated funds.

The APRA Act refuses because we are and the SIS Act refuses because we are not. Such inconsistencies make our argument for transparency of information compelling.

### **2. Denies victim's rights under the Victims of Crime Act 1994 (the Act).**

Section 56 of the APRA Act, denies the Trio victims their rights under the Victims of Crime Act 1994 (the Act). Specifically the Act states that inconvenience to victims should be minimised, that victims be informed about what is going on, and also informed about what is being done about the return of property. However, the overriding force of s56 of the APRA Act does not acknowledge victims rights as laid out in the Act.

Section 56 of the APRA Act / Section 38 of the FOI Act is absolute and cannot be overturned by the Administrative Appeals Tribunal or the OAIC. This nullifies the FOI process and contradicts the intention of the FOI Act that is intended to facilitate democracy by allowing citizens access to the information required to participate meaningfully in the democratic process, and also to ensure that politicians and bureaucrats remain accountable to the citizenry.

This contradiction in terms is reflected also in *Sweeney and Australian Prudential Regulation Authority [2013] AICmr 67 (27 August 2013)* that the IC suggested VOFF read (letter Dec 1<sup>st</sup> 2016). Simply the FOI Act is extinguished by s56 of the APRA Act.

### **3. Public interest**

It seems undemocratic to imagine that the argument for the 'public interest test' to release information may also be pointless if the IC is powerless to overturn APRA's decision. The public need to be informed that they have NO RIGHT to know what happened if their superannuation or investment savings are stolen. It is in the public interest that information and evidence of financial fraud is available so lessons can be learnt and strategies put in place to minimise a recurrence. By denying the public evidence and information surrounding financial fraud, the public are vulnerable to bullying or fed incorrect information, such as after the Trio fraud was discovered, some of the Trio victims were accused of 'swimming outside the flags' and the crime was called a 'collapse'.

#### **4. Conflicted.**

APRA's position to refuse to release information can be perceived as conflicted. APRA looks after the APRA regulated funds while distancing itself from other types of funds and investors in the market. For example, APRA gained an insight into the Trio director's abilities or lack of (2004 to 2009) as APRA were not only the regulators of the Trio / ASF directors and entities but also helped shape legislation concerning *Part 23 of the Superannuation Industry (Supervision) Act 1993*.

APRA had representatives at two important meetings that shaped Part 23 SIS Act legislation:<sup>7</sup> Although the meetings decided that self-managed super funds (SMSFs) do not require a safety net in the event of a 'fraud' occurring in the market, the SMSFs or direct investors were not informed or did they have representatives at the meetings. There is no evidence to show that the financial market was informed (prior Sept 2009) about 'fraud' or about fraud protection (that covers / protects only the APRA regulated funds).

In 2006 APRA found that the Trio directors were a "bunch of incompetents"<sup>8 & 9</sup> but did not warn the market. APRA's failure to do anything other than steer the 'bunch of incompetent' directors in the right direction, left the fraudulent opportunity wide open. APRA's Ross Jones informed VOFF that APRA are not required to inform the market.<sup>10</sup>

Due to the FOI requests being denied, the public are denied to learn of the processes APRA used in the regulatory governance of Trio. The circumstances surrounding Trio shows that APRA's competitors in the financial market are the very funds that suffered the greatest damage through fraud. Damage of non-APRA funds is beneficial for the APRA regulated funds as the collateral damage can be contrasted against the APRA regulated funds as the safe option. Around 2012 - 2013 the ATO detected a decline in the growth of self-managed funds numbers while according to APRA, the net establishment rate of SMSFs continues to decline.<sup>11</sup>

Treasury write in its Review, *'While it is not possible for any regulatory regime to prevent all risks of potential theft or fraud, the best way to prevent such cases in the future is to ensure that investors understand that all investments are subject to a trade-off between risk and potential reward. And in the case of SMSF trustees, that they understand that they do not have access to compensation in the same manner as APRA regulated superannuation funds.'*<sup>12</sup>

Treasury's Review fails to recognise Trio as a transnational organised crime that targeted the Australian financial market and exploited weaknesses in the financial system. APRA's avoidance to make publicly available evidence that would provide a meaningful contribution into the understanding of the Trio fraud, illustrates the problem the public face. Treasury and APRA can be seen as serving and protecting themselves, but not serving the public interest.

#### **5. ASIC and APRA services based on Trust**

Australian citizens trust that the financial regulators fulfil their roles at regulating and the governance of the Australian financial market. Citizens are expected to 'trust' ASIC and APRA, without questioning whether they did their job properly. In the case of the Trio victims, that Trust was breached and the doors shut preventing the public finding out just what the regulators did or didn't do.

APRA's website outlines its vision, mission and values, claiming APRA play a critical role in protecting the financial wellbeing of the Australian community. But in the Trio case it is not the community that APRA protect but rather exclusively the APRA regulated funds. APRA had an active role in the processing the Part 23 of the SIS Act Claim for the APRA regulated fund members. The information that APRA relied on to assist the APRA regulated funds is denied to all other investors in the Australian financial market. Trustees of the non-APRA regulated funds pay licensing fees to APRA through their financial advisor. All the investors absorb licensing costs such as Trio's superannuation entity (RSE) licence under the Superannuation Industry (Supervision) Act 1993 (SIS Act). Despite no difference in charges between APRA regulated and non-APRA regulated funds, APRA exercise its services selectively and exclusively to APRA regulated funds.

Trio's frozen assets, belonging to all the investors, help finance the liquidator's investigation, and funded the documented account of the fraud. The information in the document assisted the APRA regulated fund members claim compensation for their losses in Trio. That same information is another document denied to the non-APRA regulated investors.

APRA say that they do not hinder competition. However, the Trio case shows that distinctions were made between investors of the same fraud, distinctions in how the various victims were treated, and distinctions with accessing or being denied information, all distinctions were favourable to the APRA regulated funds but disadvantaged the non APRA regulated funds.

### **Conclusion**

VOFF urges the Commissioner to investigate how the applicant can access the information outlined in the FOI request. This letter alleges APRA has not exercised its role in accordance to its mission statement, which under the circumstances warrants the IC to review APRA's decision more thoroughly.

Section 38(2) of the FOI Act may apply to the information held by APRA as the assets of an individual in Trio / ASF is personal information. How each person interpret the complaints made against the fund holding his/her personal property, or how they interpret the fit and proper test is unknown to other members and cannot be classified as 'mixed personal information'. Dependent on the reader the information would be objective and/or subjective. Each person brings their own personal experience to the interpretation of the data, and they digest that information into personal information. The release of the information in question will not be a breach of personal confidential details of another person.

If the IC is powerless to overturn APRA's decision, then VOFF ask for the OAIC to call on APRA to provide a Schedule of the documents that are being refused (as captured in FOIs 409 and 412). The information VOFF seek is not intended to humiliate APRA but rather to show the victims and the public what happened in Australia's largest financial fraud in history.

VOFF will continue to fight against the impenetrable legislative fortress covering up the details of the Trio / ASF fraud so we can learn from the ordeal. VOFF hold the right to release this letter in part or whole.

Thank you  
Yours Sincerely  
John Telford



Secretary VOFF

## Endnotes.

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- <sup>1</sup> Graham, Megan White Collar Crime and the United States' Economy. 2012  
University of New Hampshire pages 5&6 Ref: Van der Veen, Wilma. "Crime". 21 April 2006.
- <sup>2</sup> Graham, Megan White Collar Crime and the United States' Economy. 2012  
University of New Hampshire page 29
- <sup>3</sup> Black, William K. 'When Fragile becomes Friable: Endemic Control Fraud as a Cause of Economic Stagnation and Collapse' Institute for Fraud Prevention IDEAS Workshop: Delhi, India  
Financial Crime and Fragility under Financial Globalization December 19-20, 2005
- <sup>4</sup> Regina v Shawn Darrell Richard [2011] NSWSC 866 (12 August 2011) before Garling J
- <sup>5</sup> Section ii Understanding White-Collar Crime Definitions, Extent, and Consequences page 43
- <sup>6</sup> The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data Cynthia Barnett U.S. Department of Justice, Federal Bureau of Investigation page 15
- <sup>7</sup> VOFF Freedom of Information No 309 to Treasury December 7th 2014 request for document regarding the stakeholders attending Reviews of Part 23 of SIS Act Meeting.
- <sup>8</sup> July 5, 2012 VOFF delegation attended a meeting APRA's office in Market St. attended by the then Superannuation Minister, Bill Shorten, APRA's Ross Jones and ASIC's Greg Medcraft.
- <sup>9</sup> Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Collapse of Trio Capital. (30.8.2011) - Sydney p 38
- <sup>10</sup> July 5, 2012 VOFF delegation to APRA office in Market St. attended by Shorten, Jones and Medcraft.  
Subject: VOFF Mtg 5th July 2012 with Minister Shorten, APRA & ASIC.
- <sup>11</sup> Highlights from the Investment Trends 2015 Self Managed Super Fund Survey  
<http://www.investmenttrends.com.au/wp-content/uploads/2015/08/Highlights-from-the-Investment-Trends-2015-SMSF-Survey.pdf>
- <sup>12</sup> Treasury's Review of the Trio Capital Fraud and Assessment of the Regulatory Framework  
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