

To the Office of the Australian Information Commissioner (OAIC)



OAIC references- MR17/00091

February 22nd 2017

Dear Information Commissioner,

Thank you for your letters dated February 20th & 21st 2017, seeking a copy of the Australian Securities and Investments Commission (ASIC) decision letter for Victims of Financial Fraud (VOFF Inc) Freedom of Information (FOI) request No 451. Please find copy of ASIC's decision letter enclosed.

Initially VOFF sought a review by the Information Commissioner (IC) of ASIC's decisions in 450 and 451 together as they are inter related. But by the two separate letters received from the IC it appears the single issue is now two separate issues.

This change of circumstance warrants a cover letter to argue why VOFF believe ASIC's decision for FOI 451 must be reviewed. We understand that the IC will focus on whether ASIC followed the processes required under legislation. We believe that ASIC is faultless in following the processes, however, we perceive a fundamental problem is not being addressed by ASIC or the limitations available to the IC's process. That fundamental problem is that superannuation is mandated and if investor's saving disappear, the fund account holder / trustee is not entitled to learn what happened to his / her savings or are investors entitled to learn what the financial regulators did or didn't do in protecting Australian superannuation.

The information we seek provides a window into ASIC's governance of the Australian financial market. The FOI Act allows citizens to participate in policy, accountability and decision making processes. The FOI process opens the government's activities to scrutiny, discussion, comment and review. The fundamental purpose of the FOI Act is to *"give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies"* ... *to promote Australia's representative democracy by contributing towards ... promoting better-informed decision-making and ...increasing scrutiny, discussion, comment and review of the Government's activities. ...at the lowest reasonable cost. Source: FOI Act.*

The information we seek is ASIC's interaction / investigated with the Astarra Strategic Fund (ASF) / Trio Capital Limited (Trio) and its entities. It is assumed (no one has seen ASIC's account of why or how Trio collapsed) is the information that comprises the Appendix 4. ASIC provided the Appendix 4 to the Parliamentary Joint Committee Inquiry into the Collapse of Trio Capital, however, the PJC made no mention about receiving the Appendix 4 in their Report.

It is speculated that Appendix 4 examined the background of the Trio operatives that purchased, set up the Trio scheme and operated the Trio scheme. Two Trio shareholders, Mr James

Sutherland and Mr Jack Flader, are assumed to be the subject of the information that ASIC sent to the United Kingdom's Serious Fraud Office (SFO) in late 2015 early 2016 – which is what our FOI 451 application requested.

VOFF argue that substantiated facts about Mr Sutherland and Mr Flader should be publicly available for the health and safety of the Australian financial market. Unsubstantiated facts should also be released and to be treated accordingly to law. It is in the public interest that the public be offered the right to learn how ASIC carried out its role as regulator in its interactions with Mr Sutherland and Mr Flader and/or the entities they established. What is publicly known is that in June 2012 ASIC said the evidence against Mr Jack Flader was insufficient to prove he breached Australian law and consequently closed their investigation into the collapse of Trio.

Three years later ASIC provided information to the SFO as the SFO tried to bring charges against Mr Sutherland and Mr Flader in a London court. It is of public interest to learn what the information details were and whether ASIC found new evidence since it closed its investigation into the Collapse of Trio in 2012.

ASIC's decision letter stated that it refused to release the information sought by FOI 451 relying on section 33 or subsection 37(1) of the FOI Act.

ASIC further point out that in relation to our request, only section 33 is applicable in that if the document/(s) sought in our request did exist, it/they would be exempt under section 33 of the Act (in particular section 33(a)iii) which states that:

"A document is an exempt document if disclosure of the document under this Act:

(iii) the international relations of the Commonwealth; or

(b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Note: See also subsection 4(10).

To our knowledge ASIC made no approach to the authorities of the foreign government in question to ask if they mind if the information in regards to the collapse of Trio can be shown to the 6,000 people in Australia that lost their saving. Also the information would enable the 14.8 million Australians with a super fund to then make an informed decision about the security of their investments.

This same Trio type scenario happened once before when an Australian citizen faced 9 charges of fraud against the Commonwealth after he used a company based in Hong Kong (via Mr Sutherland and Mr Flader's office) to defraud the Australian Tax Office. In this particular case ASIC went to Mr Sutherland and Mr Flader's office to subpoena 100,000 documents in 2002 that assisted in the prosecution laying charges. But it seems the information was filed and forgotten. Because in September 2009 Mr Sutherland and Mr Flader reappear in connection to the disappearance of \$194.5 million lost from the Trio scheme.

Without information about what ASIC do or don't do to protect superannuation, round three is a high probability and mandated superannuates who have been given a false sense of security that two Australian regulators provide compliance and security of the financial system will be targeted. When round three hits it will be the 6,000 Australians that suffered by Trio who will remember the name 'Mr Flader'.

It is in the public interest to know whether ASIC has enough resources and enough power to manage the multi jurisdictional complexities of the global financial market. For example, ASIC's limitations in the Trio investigation were acknowledged in 2013 during a Parliamentary Joint Committee Statuary Oversight. The committee noted,

"Fraudulent activity where money is siphoned to other jurisdictions is an international problem. The committee is of the view that Mr Medcraft's new position as head of the international corporate regulator provides an

*opportunity to negotiate measures that would close the loopholes in international fraud detection and response."*¹

It is unknown whether ASIC were given greater powers to improved its jurisdiction flexibility or whether the Serious Financial Crime Taskforce (SFCT) will take over this role. VOFF are concerned and it is a concern shared by Senator Boyce when she asked at a parliamentary hearing, *"I suppose my concern as a legislator would be if there are people who have committed wrong in the view of society and yet are outside the reach of any laws or regulations of the country."*

The question was directed at Mr Ross Jones, Deputy Chairman and Member of the Australian Prudential Regulatory Authority (APRA).

Mr Jones answered saying, *"It would certainly be our concern as well, and it is something that we would raise directly with Treasury via our normal processes. Any time we believe that there are gaps in legislation, we automatically revert back to Treasury to discuss these sorts of matters"*²

Whether these loopholes in international law have been amended is of public interest as citizen's mandated superannuation is reliant on what ASIC do or don't do to keep Australian superannuation safe.

In the case of FOI 451 ASIC refuse to release information based on the possibility that it could reasonably be expected to cause damage to the international relations of the Commonwealth. However by refusing to release information that can influence investors to check the security of their savings, is definitely exposing investors to financial harm.

It is in the public interest to learn whether ASIC has the power to protect Australia's superannuation assets of \$2.05 trillion and to learn what ASIC provided the United Kingdom SFO concerning Trio / Mr Sutherland and Mr Flader.

The 14.8 million Australians in superannuation should be entitled to evidence based facts. Investors should also be entitled to see what ASIC does in its role as security and investments commissioner and for ASIC to demonstrate that it does take investors' interests seriously.

In 1822, founding father and fourth President of the United States of America James Madison said that:

*"A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives."*³

Thank you
John Telford



Secretary VOFF

¹ Parliamentary Joint Committee on Corporations and Financial Services, Statutory Oversight of the Australian Securities and Investments Commission, Number 2, May 2013. Page 47

² Official Committee Hansard Parliamentary Joint Committee On Corporations And Financial Services, Collapse of Trio Capital. Tuesday, 30 August 2011 Sydney Page 41

³ The Senate, Freedom Of Information Amendment (Open Government) Bill 2000 Second Reading, SPEECH Tuesday, 5 September 2000