Ten regulatory failures around Trio: John Telford 17.01.2019

On 1 April 2016 Ms O'Dwyer said, *"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."*[1]

No evidence supported Ms O'Dwyer's statement or verified how ASIC or APRA carried out their roles appropriately. In 2018 the Banking Royal Commission found the policing regulator was too cosy, too timid, too slow and reluctant to act against misconduct in banking and the financial services industry. The 10 failures presented here are not definitive there are many more directly related to the Trio Capital fraud.

The following evidence of 10 regulatory failures in regards to Trio has never been made available to the Australian public before. The official narrative about Trio makes no mention about what you are about to read.

1) ASIC hold information about the Hong Kong based Global Consultants and Services Limited (GCSL), a company owned and operated by American lawyer Jack Flader. In 2011 the NSW Supreme Court named Mr Flader as the architect and ultimate controller of the Trio scheme.[2] The life-blood of monies from Australia into the Trio scheme passed through GCSL. Information about GCSL was obtained by the Hong Kong Securities and Futures Commission and released to ASIC under a Memorandum of Understanding (MoU). ASIC never informed the Parliamentary Joint Committee which was set up to investigate the Trio fraud, about the GCSL documents. ASIC refuse to give the GCSL documents to the liquidator it commissioned to liquidate Trio. The Liquidator had to take ASIC to court to gain access to the documents and only then it received only a small portion. If any documents needed to be forensically examined to find out about the massive fraud, they would be the GCSL documents. Failing to provide these vital documents casts doubt on the PJC's understanding of the Trio fraud.

2) ASIC failed to see early warning posted by its New Zealand counterpart:
In 2010 investigative journalist Stuart Washington noted that the New Zealand Securities Commission in 2001 named a dozen unlicenced brokers operating Millennium Financial in the Philippines. One of the brokers was Shawn Richard (the perpetrator who was jailed for his part in operating Trio). Mr Richard's name was on the NZSC website from 2001 but no one saw the connection to the man running the Trio Capital scheme in Australia. In September 2009 when Mr Richard's name appeared in the Australian press in relation with the Trio fraud, the warning was subsequently removed from the NZ Securities Commission website.[3]
Mr Washington questioned whether Richard's name was removed from the NZ Securities Commission website as a result of the commotion in the Australian news about the Trio fraud? The Securities Commission refused to provide a reason for why Mr Richard's name was removed.

3) ASIC failed to check its company registration database:
In 2002 ASIC went to the Hong Kong office of American lawyer Jack Flader and his business partner, Scottish accountant James Sutherland, to secure a tranche of documents (100,000) that was used as evidence to help lay criminal charges against a Queensland accountant charged with Tax Fraud against the Commonwealth. ASIC has never explained how it found incriminating

[1] Government decision on financial assistance relating to the collapse of Trio Capital http://kmo.ministers.treasury.gov.au/media-release/032-2016/
[2] Regina v Shawn Darrell Richard [2011] NSWSC 866 (12 August 2011) before Garling J.
[3] http: //www.smh.com. au/business/how-investors-in-trio-backed-the-wrong-horse-with-$426-miliion-Stuart-Washington March 27, 2010

evidence at Jack and James's office in HK while at that same time, ASIC's company registration data system held their names after registering a holding company in 2001. The holding company in late 2003 went on to purchase the Tolhurst business, a Superannuation Master Trust, as well as a private investment trust for non-super investors. In 2004 ASIC licenced Trio, failing to realise the same Hong Kong Jack and James were part of the Trio scheme.

4) ASIC failed to carry out background checks:
ASIC failed to prevent known criminals from entering the Australian financial system and failed to check the people behind the licences ASIC approved Trio. ASIC failed to adequately regulate the Trio scheme and failed to safeguard the Australian financial markets from known weaknesses that '*enabled crime figures to open individual or company accounts or deposit funds with minimal or false identification, and quietly move millions of dollars*' [4] to undisclosed overseas locations.

5) ASIC failed to see that some of the people operating the Trio scheme were barred from operating in the United States or had operated / owned unlicenced funds and/or came to the attention of financial authorities in Spain, Austria, the Netherlands, the Isle of Wight, Hong Kong and New Zealand. ASIC failed to notice the warnings posted by its international counterparts.

6) ASIC didn't know whether two men were indeed the same man:
In October 2009 during an ASIC Section 19 Examination, a Trio Director was questioned about whether Paul Richard Bell and Frank Richard Bell are the same character. ASIC jailed Paul Richard Bell - alias Dr King, in 2001, for his part in a Thailand boiler room scam. On the other hand Frank Richard Bell was one of Trio's underlying fund managers. Frank Richard Bell first appears on ASIC's company registry and Trio documents about 2001 through to about 2008. Over this same period he appeared before the United States courts for several serious breaches of financial security laws, issued with several major fines, even permanently barred and yet he remained on ASIC's company registration database

7) ASIC misled everyone about the Trio fraud:
The Trio perpetrator Shawn Richard was jailed for dishonesty over his part in the fraud yet ASIC relied on Mr Richard's word (lies?) for its account of Trio to bring down a financial advisor. ASIC's interactions with Trio can be found in a document called Appendix 4 that ASIC submitted as a "confidential" document to the Parliamentary Joint Committee Inquiry into the collapse of Trio Capital Limited. VOFF tried to access Appendix 4 under the Freedom of Information Act but the document remains exempt.

8) Money laundering and counter-terrorism financing laws (AML-CTF):
ASIC remain at arms length from problems in the financial system, claiming it relies on self-reporting. Apparently there were no suspicious transaction reports made concerning Trio.

In 2017 the Commonwealth Bank had to self-report about breaches of the anti-money laundering and terror financing law. Neither CBA or ASIC discovered the issue about failing to submit suspicious transaction reports. Law enforcement officers who were carrying out surveillance on a criminal gang noticed the failure.

In regards to the Trio fraud, the PJC noted, *"The custodian does virtually nothing to protect the funds of investors. It makes no independent checks before transferring money offshore. Instead, the*

[4] N McKenzie, R Baker, G Mitchell It's not just CBA: all the banks are exposed to millions in money laundering Sept 15 2017
http://tinyurl.com/yag9yk2l

custodian simply acts on the instructions of the responsible entity." [5]

The problem with relying on the instructions of the RE is that in the Trio case, the RE was operating a fraudulent scheme with the intention to steal the money.
The PJC also stated, "*Significantly, it is the responsibility of gatekeepers, including auditors and custodians, to report suspicious matters to AUSTRAC. ANZ, the original custodian for Trio, noted that the AML CTF Act and the Anti-Money Laundering and Counter- Terrorism Financing Rules 2007 (No. 1) require participants in the financial services industry to make due diligence inquiries when taking on prospective clients, as well as carrying out suspicious matter reporting.*" [6]

The PJC said, *"the committee did not receive a submission, or take direct evidence from AUSTRAC. It does appear, however, that AUSTRAC was not given any significant information from the various gatekeepers alerting it to suspicious activity in Trio Capital. In this context, questions must be raised as to whether the gatekeepers— particularly the financial advisers and custodians—conducted due diligence when taking on prospective clients."* [7]

After the release of the Banking Royal Commission's Interim Report, Shayne Elliott, Chief Executive Officer, ANZ, invited disgruntled bank customers to email him directly.[8] On 16 October 2018 VOFF asked Mr Elliott why the ANZ Custodian Services of Trio Capital over a three to four year period, sent nearly $200m overseas but are seemingly exempt from AML-CTF law?

Mr Elliott replied 16 October 2018 saying, "I refer to the letter by email dated 16 October 2018. ANZ is "not exempt from AML-CTF" laws and is required to, and does, meet its reporting obligations to AUSTRAC including the obligation to report all cross-border funds transfers."

In the case of the Trio fraud it is evident that the system failed. No reports were submitted, no charges were laid against those who failed to submit reports and no reasons were given as to why hundreds of millions left Australia without meeting AML-CTF obligations. The PJC Report noted, "*The committee strongly supports ASIC's program to review custodian businesses and identify those issues requiring regulatory reform. In particular, the committee urges ASIC to consider the safeguards that a custodian could put in place to ensure it is able to identify and report suspicious transfers that do not trigger the anti-money laundering provisions."*[9]

The Trio fraud illustrates problems that were not properly acknowledged but efforts to fix those very weaknesses, such as the uncertainty concerning the responsibilities and obligations of RE and custodian under the AML-CTF law.

9) ASIC orchestrated events around Trio to suit the desired outcome it wanted:
ASIC withheld information, disseminated misleading information, and never informed the public about the fact that it couldn't act against the international perpetrators because they were based in overseas jurisdictions. Attention was distracted away from the jurisdictional limitations by focusing on "poor financial advice". ASIC went after 1 out of the 155 financial advisors who had clients in the Trio scheme. Going after the financial advisor had nothing to do with the Trio crime. ASIC ignored the crime and consumers were kept in the dark over what happened to their stolen savings. In this context, it is contemptuous to hear ASIC suggest, "*little, if any" credible evidence*

[5] The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital, May 2012 Report Page 132
[6] PJC Report May 2012 pages 144 and 145 ANZ, Submission 70, p. 8.
[7] PJC Report May 2012 page 145
[8] Peter Ryan ANZ boss Shayne Elliott urges disgruntled customers to email him directly 12 Oct 2018 http://www.abc.net.au/news/2018-10-12/anz-boss-shayne-elliott-fronts-parliament/10368460
[9] PJC Report May 2012 pp 132 & 133

that the "purported" investments were actually made, or if they were, that they have any realisable value. Most of the assets invested were subsequently lost." [10]
ASIC never carried out a criminal investigation, evident by the above vagueness about the missing Trio money.

10) Misrepresentation:
After the Trio fraud the consumers who were not entitled to compensation were made to look like they wanted to be in an unprotected fund and take greater risks. The comments are simply misleading.
VOFF researched the period between 2004 to September 2009. That's the period the Trio Capital scheme was available to consumers. What became apparent, from the information that was available at the time, is the lack of warning or guidance about:
a) Fraud by organized crime gangs;
b) International fraudsters targeting superannuation;
c) Weaknesses in the financial system;
d) Fraudsters exploiting the weaknesses in the financial system;
e) Superannuation savings siphoned to undisclosed overseas locations;
f) ASIC and APRA powerless to act against fraud in international jurisdictions;
g) Flouting money laundering and counter-terrorism financing laws (AML-CTF).

Within the timeframe criteria there was no information about the above points. VOFF did receive one document under Freedom of Information law, a copy of the Part 23 of the Superannuation Industry (Supervision) Act 1993 (SIS Act). Had the SIS Act been made available to superannuation consumer(s) before September 2009, the Act alone would not have given the reader the type of information needed to avoid something like the Trio fraud.

Part 23 Application for assistance notes,

(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);

It is understood that Part 23 protects APRA-regulated funds because there are many hands handling a fund whereas SMSF trustees don't steal from themselves, so consequently don't need the same protection.

The SIS Act was written in 1993. Managed Investment Scheme (MIS) and the Managed Investments Act 1998 (MIA) commenced on 1 July 1998. Part 23 makes no reference to 'fraud' in a MIS, only within 'fund' that '*a person to pay contributions to the fund*'. Part 23 architects could not have anticipated a large-scale fraud against the Australian financial system and if they had, why would the architects protect one group without informing the other groups? Why would the architects deny information and prevent consumers from making an informed decision?

Prior Sept 2009, investors starting a superannuation fund were not aware of the protection offered by Part 23. This was not a failing by financial advisors to inform clients. Some financial advisors said they were in the industry for decades and never heard about Part 23 of the SIS Act.
APRA and Treasury were active in attending roundtable meetings where Part 23 legislation was discussed. APRA helped shape legislation around Part 23 and even though the legislation

[10] https://asic.gov.au/about-asic/media-centre/key-matters/trio-and-astarra Last updated: 28/05/2015.

concerned the financial safety of market investors, APRA never informed the market.[11] In addition to the roundtable meetings, APRA also met on several occasions with the directors of Trio. By 2006, APRA reached the conclusion that the Trio directors were a "bunch of incompetents" but never informed the market. APRA chairman Ross Jones informed VOFF that it's not required to inform the market. [12]

Before the Trio fraud people were encouraged into superannuation, encouraged by tax incentive, encouraged not to be a burden on the pension system. Now those same people recognise that there was no publicly available information about 'fraud' in superannuation or warnings about the dangers facing people who are mandated into superannuation. To suggest the SMSF trustees chose not to have 'fraud' protection is misleading.

The lack of due diligence by both financial regulators is demonstration that the regulators engaged in misconduct and conduct falling below community standards and expectations. The Banking Royal Commission uncovered the fees-for-no-services scandal. But in the case of the Trio fraud, the star rating firms, research houses, custodians and auditors all continued charging management fees for money that didn't exist. ASIC and APRA behaved as if the money existed. The entire financial system continued billing the victims over assets that had long vanished. The Trio victims were charged **fees for no assets**.

The current regulatory regime is now recognised as being significantly different from the regime that was in place at the time of the Trio fraud, see correspondence from Darren Kennedy dated 6 November 2018. It's time that the harm done to the victims be recognised.

John Telford
Secretary VOFF Inc
17.01.2019

[11] First meeting July 17th 2003 called Review of Part 23 of the Superannuation Industry (Supervision) Act 1993 - Industry Consultation. 12 attendees - APRA 4 attendees, Association of Superannuation Funds of Australia 3, Corporate Super Association 1, Institute of Actuaries 1, Investment and Financial Services Association, Law Council of Australia 1, Treasury 4 and Trustee Corporation Australia 1. No indication the above organisations represented SMSFs or direct investors. Second meeting July 21st 2003 called *Review of Part 23 – Industry Roundtable Meeting*. 10 attendees -
APRA 4, Association of Superannuation Funds of Australia 3, Australian Institute of Superannuation Trustees 1, Corporate Super Association 1, Law Council of Australia 1 and Trustee Corporation Australia 1. No one represented the interests of self-managed investors. Whatever was discussed at these important meetings was not made public. Self-managed trustees were never consulted about the decisions made that directly related to financial security issues. APRA is perceived as having interest to protect APRA-regulated funds. Information released to VOFF under FOI request to Treasury March 2015.

[12] July 5, 2012 meeting APRA's office in Market St. attendees VOFF delegation, the then Superannuation Minister, Bill Shorten, APRA's Ross Jones and ASIC's Greg Medcraft. Also see, Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Collapse of Trio Capital. (30.8.2011) - Sydney p 38

Australian Government
The Treasury

Ref: MC18-007930

Mr John Telford
Secretary VOFF Inc
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- 6 NOV 2018

Dear Mr Telford

Thank you for your correspondence of 24 October 2018 to the Treasurer concerning the collapse of Trio Capital. The Treasurer has asked me to respond to you.

On behalf of the Government I wish to express my sympathies to all investors affected by the Trio collapse, and to acknowledge the significant financial and personal stress that the collapse has caused them and their families, including to those who lost their entire retirement savings.

As you are aware, the Government has established a Royal Commission and appointed former High Court Judge, the Honourable Kenneth Madison Hayne AC QC, as Commissioner to inquire into the conduct of banks, superannuation and financial services entities to examine allegations of misconduct or conduct that falls below community expectations. The Royal Commission is examining similar issues to those you have raised in your letter and the Government will consider its response after the Commission reports in February 2019.

I note that the current regulatory regime is significantly different from the regime that was in place at the time of the Trio Capital collapse, in part because of the lessons learned from the collapse. In addition, the Government remains committed to the comprehensive package of superannuation reforms it introduced into Parliament last year. As part of this Member Outcomes package, before a change of ownership of a trustee can occur, the potential owner would need to obtain APRA approval. Changes to superannuation director penalties will address a gap in the criminal and civil penalty framework concerning misconduct of a superannuation trustee director. The measure will ensure that superannuation trustee directors are held accountable for their conduct in the same way as directors of managed investment schemes (consistent with Financial System Inquiry Recommendation 13).

More information on the package can be found at: http://kmo.ministers.treasury.gov.au/media-release/093-2017/.

Yours sincerely

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