

**NOTICE OF DECISION MADE UNDER SECTION 55G  
OF THE FREEDOM OF INFORMATION ACT 1982 (CTH) (FOI ACT)  
WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

- Applicant:** Paul Matters and John Telford, Victims of Financial Fraud (VOFF)
- Decision-maker:** Ben Carruthers, an authorised officer of the Australian Prudential Regulation Authority (APRA) for the purposes of section 23(1) of the FOI Act
- Relevant documents:** Request for documents relating to:  
i. Request 409 - APRA's processing of complaints of Astarra and entities in the period 2004-2007  
ii. Request 412 - APRA's 'fit and proper person' assessment of Trio directors and Astarra board in 2005, 2006 and 2008
- My decision:** *Refuse access, under section 38 of the FOI Act and section 56 of the Australian Prudential Regulation Authority Act 1998 (Cth) (APRA Act) to the documents specified in the Applicant's request*

**MATERIAL FACTS**

1. On 7 and 15 November 2015 VOFF submitted Request 409 and Request 412 to APRA.
2. These requests were merged and treated as one under section 24(2)(b) of the FOI Act, along with Requests 408 and 411.
3. Requests 408 and 411 have been resolved.
4. In a notice of decision dated 27 November 2015, APRA refused access to documents in respect of Requests 409 and 412, as processing the requests would have substantially and unreasonably diverted APRA's resources.
5. On 22 January 2016 APRA upheld this decision on internal review.
6. VOFF sought a review of this decision by the Office of the Australian Information Commissioner (OAIC).
7. After correspondence between APRA and the OAIC, Request 409 and Request 412 were reduced in scope to the following:

**Request 409** - APRA's acknowledgment of its own processing / assessing in hand complaints that it encountered from the period 2004 to 2007 of Astarra and entities. The document we seek would be in the form of a document created by APRA that assessed the supervision complaints about Astarra Strategic Fund Entities, whether the complaints originated within APRA's office or were provided by third party. The request for the above mentioned document is:

- i. **excluding** complaints from the general public;
- ii. **excluding** complaints received via email or telephone calls and

- iii. **excluding** personal names and information about companies that is confidential.

**Request 412** - APRA's 'fit and proper person test' of Trio directors and Astarra board in 2005, 2006 and 2008. This would include APRA generated documents of when APRA carried out the 'fit and proper person test.'

(your **Revised FOI Requests**)

- 8. APRA commenced processing the Revised FOI Requests on the basis that internal Outlook emails had been excluded from consideration.

#### **EVIDENCE AND MATERIAL RELIED ON**

- 9. In making my decision, I have relied on the following evidence and material:
  - a) Notice of IC Review and request for documents dated 24 March 2016;
  - b) letter and schedule of documents provided to OAIC on 14 April 2016;
  - c) email correspondence between Merit Review and Investigation Officer, OAIC and Senior Manager, Legal between 27 May 2016 and 23 August 2016;
  - d) email correspondence between Senior Analyst Enforcement and Senior Manager, Legal dated 2 June 2016;
  - e) email correspondence between Senior Manager, Legal and Principal Analyst dated 6 June 2016;
  - f) file note written by Paralegal, Legal dated 7 June 2016;
  - g) file note written by Graduate, Legal dated 7 June 2016;
  - h) letter from Senior Manager, Legal to Merit Review and Investigation Officer, OAIC dated 14 June 2016;
  - i) VOFF's revised FOI request received by APRA from OAIC on 19 August 2016;
  - j) file note written by Paralegal, Legal dated 30 August 2016;
  - k) email correspondence between Senior Manager, Legal and Paralegal, Legal on 3 September 2016;
  - l) file note written by Senior Manager, Legal dated 3 September 2016;
  - m) relevant sections of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**);
  - n) relevant sections of the APRA Act;
  - o) relevant sections of the FOI Act; and
  - p) guidelines issued by the OAIC to date (**FOI Guidelines**).

## REASONS FOR DECISION

10. APRA has conducted all reasonable searches of its records and identified documents relevant to your Revised FOI Requests (**Relevant Documents**).
11. I have decided to refuse access to the Relevant Documents as they are protected under section 38 of the FOI Act and section 56 of the APRA Act.

### Secrecy Provisions

12. I have taken the following approach in relation to the application of section 56 of the APRA Act and section 38 of the FOI Act:
  - a) under section 38 of the FOI Act, a document is exempt if disclosure is prohibited under a provision of an enactment and section 38 expressly applies to that provision;
  - b) 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;
  - c) under section 56(2) of the APRA Act it is an offence to directly or indirectly disclose protected documents and/or protected information unless a specified exemption applies. This offence provision is binding on me as an APRA staff member. The offence is punishable by up to two years imprisonment;
  - d) a 'protected document' is defined in section 56(1) of the APRA Act to include documents given or produced under or for the purposes of a prudential regulation framework law, and containing information relating to the affairs of a financial sector entity. The SIS Act and the APRA Act are prudential regulation framework laws. The documents relate to Trio Capital Limited (in liq) (formerly known as Astarra Capital Limited), which is a financial sector entity. Therefore, the Relevant Documents are protected documents unless otherwise publicly available;
  - e) 'protected information' is defined in section 56(1) of the APRA Act to include information disclosed or obtained under or for the purposes of a prudential regulation framework law, and relating to the affairs of a financial sector entity. For the same reasons set out in paragraph 12(d) above, information contained in the Relevant Documents is protected, unless otherwise publicly available; and
  - f) The Relevant Documents are not otherwise publicly available.
13. I am satisfied that the Relevant Documents are protected documents, and/or contain protected information as defined in section 56(1) of the APRA Act and that the documents are consequently exempt under section 38 of the FOI Act.

## **ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW**

### ***Application for review by Information Commissioner***

14. Pursuant to section 54L of the FOI Act, you have the right to apply to the Information Commissioner (the **Commissioner**) for a review of the decision made on review (the **Revised Decision**). The Commissioner is required to treat the Revised Decision as though it is the decision for review (FOI Act section 55G(2)(b)).
15. Any application must be in writing, and must give details of an address where notices may be sent and include a copy of the Revised Decision.
16. An application for review by the Commissioner should be sent:
  - Online: [www.oaic.gov.au](http://www.oaic.gov.au)
  - Post: GPO Box 5218, Sydney NSW 2001
  - Fax: +61 2 9284 9666
  - Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
  - In person:  
Level 3, 175 Pitt St,  
Sydney, NSW

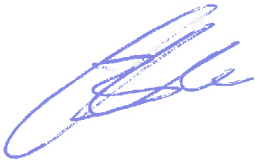
### ***Application for review by Administrative Appeals Tribunal***

17. If the decision on review by the Commissioner is not to grant access to all of the documents within your request, you would be entitled to seek review of that decision by the AAT.
18. The AAT is an independent review body with the power to make a fresh decision. An application to the AAT for a review of an FOI decision does not attract a fee. The AAT cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the AAT on 1300 366 700.

### ***Complaints to the Information Commissioner***

19. 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 an independent investigation of your complaint.

20. You may complain to the Commissioner either orally or in writing, by any of the methods outlined above, or by telephone, on 1300 363 992.



Ben Carruthers  
FOI Officer  
Australian Prudential Regulation Authority  
Date: 7.9.16

## FREEDOM OF INFORMATION ACT 1982

### 38 Documents to which secrecy provisions of enactments apply

- (1) Subject to subsection (1A), a document is an exempt document if:
  - (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and
  - (b) either:
    - (i) that provision is specified in Schedule 3; or
    - (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.
- (1A) A person's right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.
- (2) Subject to subsection (3), if a person requests access to a document, this section does not apply in relation to the document so far as it contains personal information about the person.
- (3) This section applies in relation to a document so far as it contains personal information about a person if:
  - (a) the person requests access to the document; and
  - (b) disclosure of the document, or information contained in the document, is prohibited under section 503A of the *Migration Act 1958* as affected by section 503D of that Act.
- (4) In this section:

**enactment** includes a Norfolk Island enactment.

## AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY ACT 1998

### 56 Secrecy—general obligations

- (1) In this section:

**body regulated by APRA** includes a body that has at any time been a body regulated by APRA.

**court** includes a tribunal, authority or person having the power to require the production of documents or the answering of questions.

**financial sector entity** has the same meaning as in the *Financial Sector (Collection of Data) Act 2001*.

**officer** means:

- (a) an APRA member; or
- (b) an APRA staff member; or
- (c) any other person who, because of his or her employment, or in the course of that employment:
  - (i) has acquired protected information; or

- (ii) has had access to protected documents;  
other than an employee of the body to which the information or document relates.

**personal information** has the same meaning as in the *Privacy Act 1988*.

**produce** includes permit access to.

**protected document** means a document given or produced (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and containing information relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) of the *Financial Sector (Collection of Data) Act 2001*;

other than:

- (d) a document containing information that has already been lawfully made available to the public from other sources; or
- (e) a document given or produced under, or for the purposes of, a provision of the *Superannuation Industry (Supervision) Act 1993*:
  - (i) administered by the Commissioner of Taxation; or
  - (ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes a document that is given to APRA under Part 7.5A of the *Corporations Act 2001*, other than a document containing information that has already been lawfully made available to the public from other sources.

**protected information** means information disclosed or obtained (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and relating to the affairs of:

- (a) a financial sector entity; or
- (b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a body regulated by APRA or to a registered entity; or
- (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity; or
- (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) of the *Financial Sector (Collection of Data) Act 2001*;

other than:

- (d) information that has already been lawfully made available to the public from other sources; or

- (e) information given or produced under, or for the purposes of, a provision of the *Superannuation Industry (Supervision) Act 1993*:
  - (i) administered by the Commissioner of Taxation; or
  - (ii) being applied for the purposes of the administration of a provision administered by the Commissioner of Taxation.

It also includes information that is given to APRA under Part 7.5A of the *Corporations Act 2001*, other than information that has already been lawfully made available to the public from other sources.

**registered entity** means a corporation that is, or has at any time been, a registered entity within the meaning of the *Financial Sector (Collection of Data) Act 2001*.

- (2) A person who is or has been an officer is guilty of an offence if:
  - (a) the person directly or indirectly:
    - (i) discloses information acquired in the course of his or her duties as an officer to any person or to a court; or
    - (ii) produces a document to any person or to a court; and
  - (b) the information is protected information, or the document is a protected document; and
  - (c) the disclosure or production is not in accordance with subsection (3), (4), (5), (5AA), (5A), (5B), (5C), (6), (7), (7A), (7B) or (7C).

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (3) It is not an offence if the disclosure of protected information or the production of a protected document by a person is for the purposes of a prudential regulation framework law.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) It is not an offence if the disclosure of protected information or the production of a protected document by a person:
  - (a) is by an employee of the person to whose affairs the information or document relates; or
  - (b) occurs after the person to whose affairs the information or document relates has agreed in writing to the disclosure or production.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- (5) It is not an offence if the disclosure of protected information or the production of a protected document by a person:
  - (a) occurs when the person is satisfied that the disclosure of the information, or the production of the document, will assist a financial sector supervisory agency, or any other agency (including foreign agencies) specified in the regulations, to perform its functions or exercise its powers and the disclosure or production is to that agency; or
  - (b) is to another person and is approved by APRA by instrument in writing.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

- (5AA) It is not an offence if the disclosure of protected information or the production of a protected document is made:



- (a) by an officer of an agency to which the information or document has been disclosed or produced under paragraph (5)(a); and
- (b) for the same purpose as the information or document was so disclosed or produced to that agency.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5A) (see subsection 13.3(3) of the *Criminal Code*).

- (5A) It is not an offence if the production by a person of a document that was given to APRA under section 9 or 13 of the *Financial Sector (Collection of Data) Act 2001* is to the Australian Statistician for the purposes of the *Census and Statistics Act 1905*.

Note: A defendant bears an evidential burden in relation to matters in subsection (5A) (see subsection 13.3(3) of the *Criminal Code*).

- (5B) It is not an offence if the production by a person of a document that was given to APRA under section 9 or 13 of the *Financial Sector (Collection of Data) Act 2001* is to:

- (a) the Reserve Bank of Australia; or
- (b) another prescribed authority.

Note: A defendant bears an evidential burden in relation to matters in subsection (5B) (see subsection 13.3(3) of the *Criminal Code*).

- (5C) If:

- (a) a document is a reporting document given to APRA under section 13 of the *Financial Sector (Collection of Data) Act 2001*; and
- (b) either:
  - (i) a determination has been made under section 57 that the document does not, or documents of that kind do not, contain confidential information; or
  - (ii) a determination has been made under section 57 that a specified part of the document, or of documents of that kind, does not contain confidential information;

it is not an offence to disclose the document or that part of the document, or any information contained in the document or that part of the document, to any person (including by making the document, the part of the document or the information available on APRA's website).

- (6) It is not an offence if the disclosure of protected information or the production of a protected document is to:
- (a) an APRA member; or
  - (b) an APRA staff member;

for the purposes of the performance of APRA's functions, or the exercise of APRA's powers, under a law of the Commonwealth or of a State or a Territory.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

- (6A) It is not an offence if the disclosure of protected information or the production of a protected document is to:

- (a) an auditor who has provided, or is providing, professional services to a general insurer, authorised NOHC or a subsidiary of a general insurer or authorised NOHC; or
- (b) an actuary who has provided, or is providing, professional services to a general insurer, authorised NOHC or a subsidiary of a general insurer or authorised NOHC;

and the disclosure is for the purposes of the performance of APRA's functions, or the exercise of APRA's powers, under a law of the Commonwealth or of a State or Territory.

- (7) It is not an offence if the information, or the information contained in the document, as the case may be, is in the form of a summary or collection of information that is prepared so that information relating to any particular person cannot be found out from it.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

- (7A) It is not an offence if the information, or the information contained in the document, as the case may be, is all or any of the following:

- (a) the names of bodies that are regulated by APRA;
- (b) the addresses at which bodies referred to in paragraph (a) conduct business;
- (c) any other information that is reasonably necessary to enable members of the public to contact persons who perform functions in relation to bodies referred to in paragraph (a).

Note: A defendant bears an evidential burden in relation to the matters in subsection (7A) (see subsection 13.3(3) of the *Criminal Code*).

- (7B) It is not an offence if the information, or the information contained in the document, as the case may be, is:

- (a) a statement of APRA's opinion as to whether or not a body regulated by APRA is complying, or was complying at a particular time, with a particular provision of a prudential regulation framework law; or
- (b) a description of:
  - (i) court proceedings in relation to a breach or suspected breach by a person of a provision of a prudential regulation framework law; or
  - (ii) activity engaged in, or proposed to be engaged in, by APRA in relation to such a breach or suspected breach; or
- (c) a description of action under a prudential regulation framework law that APRA has taken or is proposing to take in relation to:
  - (i) a body regulated by APRA; or
  - (ii) an individual who holds or has held a position with or in relation to such a body.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7B) (see subsection 13.3(3) of the *Criminal Code*).

- (7C) If information referred to in subsection (7A) or paragraph (7B)(a) that relates to a body that is, or has at any time been, regulated by APRA under the *Superannuation Industry (Supervision) Act 1993* is disclosed to the Registrar of the Australian Business Register established under section 24 of the *A New Tax System (Australian Business Number) Act 1999*, the Registrar may enter the information in that Register.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7C) (see subsection 13.3(3) of the *Criminal Code*).

- (8) A person who is, or has been, an officer cannot be required to disclose to a court any protected information, or to produce in a court a protected document, except when it is necessary to do so for the purposes of a prudential regulation framework law.
- (9) If a person discloses information or produces a document under this section to another person, the first person may, at the time of the disclosure, impose conditions to be complied with in relation to the information disclosed or the document produced.

- (10) A person is guilty of an offence if the person fails to comply with a condition imposed under subsection (9).

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (11) A document that:
- (a) is a protected document; or
  - (b) contains protected information;

is an exempt document for the purposes of section 38 of the *Freedom of Information Act 1982*.

Note: For additional rules about personal information, see the *Privacy Act 1988*.

- (12) A disclosure of personal information is taken to be authorised by this Act for the purposes of paragraph 6.2(b) of Australian Privacy Principle 6 if:
- (a) the information is protected information and the disclosure is made in accordance with any of subsections (4), (5), (5AA), (6), (7A), (7B) and (7C); or
  - (b) the information is contained in a protected document and the disclosure is made by the production of the document in accordance with any of those subsections.

