

Submission by Victims of Financial Fraud (VOFF Inc) to The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Regarding: strong regulatory and supervisory frameworks.

March 5th 2018

To the Honourable Kenneth Madison Hayne AC QC,

Trio Capital Limited (Trio) was the holder of an Australian Financial Services Licence (AFSL) issued by The Australian Securities and Investments Commission (ASIC) which authorised it, as a responsible entity, to operate managed investment schemes registered under the Corporations Act 2001 (Corporations Act).¹ Trio appointed ANZ Banking Corporation as Custodian and Trio was the Responsible Entity (RE) under AML/CTF Act. But unknown to consumers, the RE acquired in 2008 from the Australian Transaction Reports and Analysis Centre (AUSTRAC), an 'Exemption' for Absolute Alpha Pty Ltd² (part of the Trio scheme) that seemingly circumnavigated requirements under the AML/CTF Act.

Consumers took comfort in knowing that the Trio scheme adhered to the Anti-Money Laundering and Counter-Terrorism Financing Act as expected in banking. To this day consumers have not been informed why their security and safety was compromised without their knowledge or why there has been no investigation by ASIS into this matter.

The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital, make no mention in their May 2012 report of the AUSTRAC exemption. The Australian Prudential Regulatory Authority (APRA) and the assigned liquidator PPB Advisory also make no mention of the AUSTRAC exemption.

VOFF's attempt to learn about the matter.

- On 22nd February 2016 VOFF submitted an FOI to AUSTRAC requesting a copy of the AUSTRAC's 'Exemption' to waiver the Absolute Alpha fund from AML/CTF legislation.³ (VOFF already had a copy of the exemption but weren't positive of its authenticity).
- On 24th March 2016 AUSTRAC said no such document exists.
- On 8th April 2016 VOFF sent AUSTRAC a copy of the exemption document. See pages 2 and 3 of this letter.
- On 2nd June 2016 VOFF received from AUSTRAC a 7-page document that included the application for the exemption. See pages 4 to 10 of this letter.

¹ Report of the APRA Inspector pursuant to section 284 of the Superannuation Industry (Supervision) Act 1993 7 April 2016 page 6

² Absolute Alpha Pty Limited ABN 24 113 940 953, Registration Date: 22/04/2005 with the Australian Securities & Investments Commission (ASIC), Australian Financial Services Licence (AFSL) Rep No. 28937 and is appointed as an authorized representative of Wright Global Investments Pty Ltd. Absolute Alpha Pty Ltd is an Authorised Representative of Wright Global Investments Pty Ltd, AFSL 225058. Absolute Alpha Pty Limited changed its name in August 2009 to Astarra Asset Management Pty Limited and was the investment manager and External Administration for the Astarra Strategic Fund (ASF). Shawn Richard was a director of Absolute Alpha.

³ Note. Absolute Alpha was a fund of hedge funds based in Australia and started in August 2005. In 2006–2007 Research house Van Mac gave Absolute Alpha a 5 star rating. Absolute Alpha was the investment manager of the Astarra Strategic Fund (ASF). In August 2009, Absolute Alpha renamed to 'Astarra Asset Management' (AAM).



Australian Government
Australian Transaction Reports
and Analysis Centre

Exemption

Section 248 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

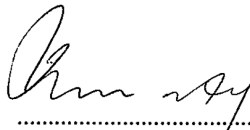
I, Thomas Story, Acting AUSTRAC CEO, pursuant to paragraph 248(1)(a) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)*, hereby exempt Absolute Alpha Pty Ltd ACN 113 940 953 of Suite 5302 Level 53, MLC Centre, 19-29 Martin Place, Sydney NSW 2000 from the following specified provisions of the AML/CTF Act:


- (a) sections 1-252

Conditions

Pursuant to paragraph 248(2)(b) of the AML/CTF Act, the exemption is subject to the following conditions:

1. Absolute Alpha must inform the AUSTRAC CEO or delegate of any changes that may affect the exemption and/or conditions imposed by this written instrument within 14 days from when the change affecting the exemption occurs.


.....
Thomas Story, Acting AUSTRAC CEO


.....2008

Important Notice to person named in this instrument

1. Any request for a variation to this instrument must be submitted to the AUSTRAC CEO or approved delegate within 14 days from when the variation is sought.
2. Pursuant to subsection 248(3), the person granted the exemption must comply with the conditions set out in the instrument. Failure to comply with those conditions may result in the revocation of the exemption and action against the person may be commenced under subsection 248(3) of the AML/CTF Act.
3. It is an offence under sections 136, 137 and 138 of the AML/CTF Act to provide false and misleading information or false documents. If any of the information submitted by the applicant or its representatives is found to be false and misleading, the exemption may be revoked, and action may be initiated against the applicant.
4. The person granted the exemption may request the AUSTRAC CEO at any time to revoke or vary the exemption.



Our ref: 16/191

1 June 2016

Mr John Telford
Victims of Financial Fraud

personal address

Dear Mr Telford,

Freedom of Information request decision – Absolute Alpha

The Australian Transaction Reports and Analysis Centre (AUSTRAC) refers to your Freedom of Information request (FOI request) that was received on 8 April 2016 in which you sought access to documents in relation to Absolute Alpha, under the provisions of the *Freedom of Information Act 1982* (FOI Act), that you understood to be held at AUSTRAC.

The scope of your FOI request is as follows:

'The document showing how and by whom requested this exemption.'

In a telephone conversation of 8 April 2016, you confirmed that third party consultation was to be undertaken. Accordingly, AUSTRAC conducted third party consultation. Further, in accordance with section 15(6) of the FOI Act, an additional 30 days was added to the processing time to allow for consultation to be undertaken.

A search of the databases administered by AUSTRAC was conducted using the following search parameters:

| | |
|---------|---|
| Name | Absolute Alpha Pty Ltd |
| Address | Suite 5302 Level 53, MLC Centre, 19-29 Martin Place, Sydney NSW 2000 |
| A.C.N. | 113 940 953 |

The result of these searches revealed a total of **1 document**, consisting of 3 pages, within the scope of your request. I have examined the document and have decided to release the document in full.

Section 26 of the FOI Act requires AUSTRAC to provide a statement of reasons in support of a decision. My reason for this decision is set out in **Attachment A**.

The FOI Act provides a number of avenues for review if you are dissatisfied with any aspect of this decision. Your review rights are set out in **Attachment B**.

I have enclosed a copy of the released documents in accordance with the FOI Act. If you have any questions or require further information, please contact the decision maker on 02 6120 2630 or via email INFO_ACCESS@austrac.gov.au.

Yours sincerely



Suzie Sazdanovic
Authorised Decision Maker
AUSTRAC

enc: Document released under the FOI Act

ATTACHMENT A

Statement of Reasons

I, Suzie Sazdanovic, am an officer authorised under section 23 of the FOI Act to make a decision in relation to your request. The following is my decision and the reasons for that decision.

Overview

The examination of the documents in AUSTRAC's possession revealed that a total of **1 document** have been identified to be within the scope of your request.

I have examined the document and considered all the relevant factors including third party and internal consultation. I decided to release the document in full in accordance with the FOI Act.

Evidence/Material on which my findings were based

In reaching my decision to release the documents, I relied on the following documentary evidence:

- *Freedom of Information Act 1982*;
- Guidelines issued by the Australian Information Commissioner;
- third party and internal consultation;
- the documents falling within the scope of the request; and
- your FOI request received by AUSTRAC on 8 April 2016.

ATTACHMENT B

Review Rights

The following review rights apply.

Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing to grant access to documents. An application for a review of the decision must be made in writing within 30 days of receipt of this letter. No particular form is required; however, it would assist the decision maker if the application grounds on which it is considered that the decision should be reviewed were set out.

Under section 53A of the FOI Act you may have ground for review under section 54 if you can establish that there are other documents held by AUSTRAC which have not been released.

Applications for review of the decision should be addressed to:

Australian Transaction Reports and Analysis Centre
Freedom of Information
c/- Attorney General's Department
3-5 National Circuit
BARTON ACT 2600
Facsimile +612 6120 2601
www.austrac.gov.au

It is not necessary to seek internal review before seeking review of the decision by the Australian Information Commissioner.

Office of the Australian Information Commissioner

As part of the 2016-17 Budget, the OAIC has been allocated \$37 million over the next four years to fund their ongoing Privacy and Freedom of Information functions. The OAIC will therefore remain operational and will continue to conduct Information Commissioner (IC) reviews.

IC review applications can be made to:

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001
enquiries@oaic.gov.au

For further information about IC reviews please refer to the OAIC website.

Administrative Appeals Tribunal

An application may be made to the Administrative Appeals Tribunal (AAT) after the OAIC has made a decision. The AAT may also review a decision by the OAIC not to undertake a review. An application must be submitted to the AAT within 28 days of being notified of the decision by the OAIC. The AAT can be contacted on 1300 366 700.

Complaints

If you are not satisfied with the way AUSTRAC has processed your Freedom of Information request, you can complain to the OAIC. A complaint must be made in writing and must identify AUSTRAC as the agency that made the decision. There is no particular form required to make a request, however, the complaint should set out the grounds on which it is considered the action taken in relation to the FOI request should be investigated. Complaints can be made to the OAIC at the address listed above.

For up to date information please visit the OAIC website at <https://www.oaic.gov.au>.



10 December 2007

The General Manager
Regulatory Policy
Australian Transaction Reports and Analysis Centre
PO Box 5516
WEST CHATSWOOD NSW 1515

Received
by Regulatory Policy
12 DEC 2007

Dear Sir/Madam

Absolute Alpha Pty Ltd ('Absolute Alpha')
Request for exemption and modification under section 248 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 ('AML/CTF Act', 'Act')

In accordance with section 248 of the AML/CTF Act, we wish to make a request to the AUSTRAC CEO to not treat Absolute Alpha as a Reporting Entity under section 6 of the AML/CTF Act.

With due respect, we will not be taking any action in respect of the requirements of the AML/CTF Act, in particular Part 10, including the requirements of the *Australian Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1)* ('AML/CTF Rules') while awaiting the decision of the AUSTRAC CEO concerning our request.

Background

Absolute Alpha, an Australian registered company, is the *Investment Manager* of the Alpha Strategic Fund ('Fund'), a managed investment scheme (specialising in absolute return strategies), registered with the Australian Securities and Investments Commission. In that role, Absolute Alpha is liable and accountable to Astarra Capital Limited ('Astarra'), being the Fund's Responsible Entity ('RE').

Absolute Alpha assists the RE in formulating the investment objective and strategy for the Fund, and in particular, Absolute Alpha is responsible for the investment portfolio construction and selection of underlying fund managers. These activities are undertaken by Absolute Alpha within a strict compliance and risk management framework, which includes a due-diligence process. Absolute Alpha also assists with the marketing of the Fund, but is limited to providing general information only. Absolute Alpha only deals with dealer groups and not directly with investors in the Fund, nor does it hold money on behalf of investors or Astarra.

Investors in the Fund have no discretion to select underlying fund managers or where their funds should be invested in. This is because investments in the fund are **pooled** and invested with offshore underlying managers/funds, in accordance with the Fund's investment objective and strategy, via a *Deferred Purchase Agreement*.

Absolute Alpha Pty Ltd ABN 24 113 940 953, Level 53, MLC Centre, 19-29 Martin Place, SYDNEY NSW 2000
Telephone: +61 2 9233 9800 Facsimile: +61 2 9233 9810, Web: www.absolutealpha.com.au, Email: info@absolutealpha.com.au. Absolute Alpha Pty Ltd is a Corporate Representative of Wright Global Investments Pty Ltd AFSL 225058 and Solutions Wealth Strategies Pty Ltd AFSL 262103.

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Deferred Purchase Agreement ('DPA') and Fund Investment Structure

The Fund has adopted an investment structure whereby certain parties, including:

- Absolute Alpha (as agent for Astarra);
- ANZ (as Fund Custodian and legal holder of Fund assets); and
- an off-shore counter-party (as a special purpose vehicle)

enter into a contract, referred to as DPA, for allocation or placement of investments with offshore underlying managers/funds, which may be taken to mean as 'acquisition of securities' (conversely, 'disposal of securities', where redemption or withdrawal of investments arises) under the AML/CTF Act.

In this exercise, the actual remittance of the pooled funds is made by ANZ (transferred by ANZ to the offshore underlying managers/funds in accordance with the terms of the DPA and the investment allocation portfolio developed by Absolute Alpha for the Fund).

Astarra

As the Fund's RE, Astarra is responsible for the overall management and administration of the Fund and its investments. Astarra (not Absolute Alpha) deals directly with investors in the Fund or their financial adviser/representative and is responsible for accepting and processing applications for investments in the Fund.

Astarra has appointed ANZ Banking Corporation ('ANZ') as Custodian for the assets of the Fund.

Astarra is a Reporting Entity under the AML/CTF Act.

Designated service

It appears that due to the Fund's Investment Structure, in particular, the use of a DPA, Absolute Alpha, being an agent of Astarra for purposes of 'acquiring or disposing of a security' via the DPA, is considered as a Reporting Entity under the AML/CTF Act, specifically, Item 33 of section 6.

It should be noted that Astarra is the only customer of Absolute Alpha in so far as the AML/CTF Act is concerned.

We believe that Absolute Alpha would not have been considered a Reporting Entity in respect of designated services under Item 33, but for, Absolute Alpha being a party to the DPA. We also believe that this was an unintended consequence of the AML/CTF Act.

Other matters for consideration

In addition to the above, we offer the following in support of our request for exemption as a Reporting Entity under the AML/CTF Act.

Absolute Alpha Pty Ltd ABN 24 113 940 953, Level 53, MLC Centre, 19-29 Martin Place, SYDNEY NSW 2000
Telephone: +61 2 9233 9800 Facsimile: + 61 2 9233 9810, Web: www.absolutealpha.com.au, Email: info@absolutealpha.com.au. Absolute Alpha Pty Ltd is a Corporate Representative of Wright Global Investments Pty Ltd
AFSL 225058 and Solutions Wealth Strategies Pty Ltd AFSL 282103.

- Absolute Alpha poses no risk to the integrity of the AML/CTF Act. Absolute Alpha does not deal directly with investors in the Fund nor does it transfer funds to underlying managers/funds in relation to individual investor's request. Transfer of funds under the DPA consists of pooled funds from a number of investors. Investors in the Fund have no discretion to direct which offshore underlying managers/funds should their investments be invested in.
- The granting of the exemption would be consistent with the intent and purpose of the AML/CTF Act. We believe that it is not the intent and purpose of the Act to consider entities such as Absolute Alpha, that does not deal directly with ultimate investors nor act on their behalf, as Reporting Entities.
- The level of the regulatory burden to which Absolute Alpha would be subjected to in relation to its sole customer, Astarra, which in its own right is a Reporting Entity under the AML/CTF Act, is not commensurate to the risk, if any (or lack of it), that may be applicable to Absolute Alpha. Our risk assessment of money laundering and terrorism activity for Absolute Alpha has yielded a 'highly unlikely' outcome.
- The reporting obligations under Part 3 of the Act has no direct application to Absolute Alpha. Reporting under Part 3, if any, will fall under Astarra's responsibility.

We are hoping for the favourable consideration of AUSTRAC's CEO on the matter.

Should you need more information, please do not hesitate to contact our Head of Compliance, Florissa Villavert on 02 9233 9820.

Yours faithfully



Shawn Richard
Chief Executive Officer

Absolute Alpha Pty Ltd ABN 24 113 940 953, Level 53, MLC Centre, 19-29 Martin Place, SYDNEY NSW 2000
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Why was the Trio entity entitled to an AUSTRAC exemption that provided it with a means to avoid laws when ASIC and APRA did not carry out background checks on the people operating Trio?

In the Banking Royal Commission Terms of Reference, it notes that Australia's banking system is systemically strong with internationally recognised world's best prudential regulation and oversight. However, in regards to Trio, the PJC Inquiry found,

*Trio's custodian, the National Australia Trustee Limited, has noted that the custodian does not have the expertise to question underlying values of either domestic or offshore funds.'*⁴

The PJC Inquiry also found,

*'The custodian (in Trio's case, the National Australia Bank) does very little to protect the funds of investors. It makes no independent checks before transferring money offshore. Instead, the custodian simply acts on the instructions of the responsible entity.'*⁵

The PJC noted,

*'ASIC in its submission drew attention to its current review of custodians and flagged that one aspect of the review will be to consider whether custodians should be more proactive in identifying and reporting suspicious matters involving their clients.'*⁶ & Ref.

The ANZ and NAB custodians blamed the responsible entity. The request letter by Absolute Alpha to AUSTRAC dated 10th December 2007 has Shawn Richard as the signatory and Florissa Villavert as the Head of Compliance. Shawn Richard was the RE.

Ms Villavert came to Trio with more than 15 years experience as a technical and compliance professional in the financial services industry and had worked with ASIC's predecessor, the former Insurance and Superannuation Commission.

Mr Richard was named in 2011 in the NSW Supreme Court, when Justice Garling said,

*'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 to those entitled to accurate information and that in respect of the criminality encompassed by Charge One, he received over \$1m personally, which was a very significant personal benefit.'*⁷

The Achilles heel that allowed a massive fraud to remain operating for 5 years unchallenged was due to the reliance on the RE to act lawfully. If the RE does not, as in the Trio example, ASIC, APRA, Custodians, Auditors, Research Houses, Star Rating Firms and financial services all fail. The total failure suggests a systemic failure of the Australian financial system.

⁴ The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital May 2012. page 123

⁵ PJC Report 2012 *Op. cit.* page 123

⁶ PJC Report 2012 *Op. cit.* page 12 Ref ASIC, Submission 51, p. 77.

⁷ Regina v Shawn Darrell Richard [2011] NSWSC 866 (12 August 2011) before Garling J. at 122

In the Trio case, due to the lack of transparency in the Australian financial system, consumers were denied information that could have assisted them in making an informed decision about the safety and security of their investments. An example is the AUSTRAC exemption.

Laws such as the AML/CTF Act have a purpose however seemingly it appears in the case of Trio the fraudsters used the exemption to circumvent the Anti-Money Laundering and Counter-Terrorism Financing laws to fulfill their own plan.

On April 1st 2016 Kelly O'Dwyer MP, said in a media statement, "*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.*"⁸ No evidence has ever been provided to support the above claim and much evidence gathered by VOFF points to the contrary.

The AUSTRAC exemption might be standard procedure for a managed investment scheme, but there is no evidence that ASIC and APRA looked into the exemption issue. The managed investment scheme under the Corporations Act to which Trio acted as responsible entity was regulated and licensed by ASIC. In a healthy regulatory system it is reasonable to expect information to inform and guide consumers.

VOFF remained puzzled over the AUSTRAC 'exemption' issue.

Did ASIC know that the managed investment scheme it regulated held the AUSTRAC exemption?

Was APRA aware that the Trio entity held an exemption from AML/CTF requirements?

Did this exemption place Trio in a privileged position above the Australians banks?

The lack of information around the Trio AUSTRAC exemption document (one of many unresolved issues) adds to the mounting evidence of a poorly carried out investigations into the Trio crime. Did ASIC avoid the criminality issues to attack the 1 financial advisor out of 155 that had clients in Trio?

Thank you
John Telford
Secretary VOFF Inc.

⁸ Government decision on financial assistance relating to the collapse of Trio Capital
<http://kmo.ministers.treasury.gov.au/media-release/032-2016/>