

Productivity Commission,
Superannuation: Assessing Efficiency and Competitiveness.

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Secretary
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To the Productivity Commission,

Victims of Financial Fraud offer this submission on behalf of approximately 655 people who lost their superannuation and investment savings in the Trio Capital fraud.

The Productivity Commission's 571 page Draft Report dated April 2018, is confirmation that some of the weaknesses in the financial regulatory governance and licensing process continue to undergo legislation tinkering to fix problems that were highlighted by the Trio Capital fraud.

Trio is an example where a criminal event was downplayed to cover up the failings of both regulators; to hide the weaknesses in the financial system; to distract from the systemic failure of the financial system; and to uphold confidence in the Australian financial market. Vested interest in the \$32 billion per year financial services industry also played a role in helping to discredit the self-managed superannuation fund (SMSF) sector.

Trio fraud is an example of a massive cover up and it is essential that a Royal Commission be held to root out the corruption and to seek some clarity and honesty in the system. Until integrity is restored, every piece of information by The Australian Securities and Investments Commission (ASIC) and The Australian Prudential Regulatory Authority (APRA) has the potential to be misleading unless evidence can prove otherwise.

APRA's contribution to the Commission's Draft document mixes the terms "collapse" 10 times and "fraud" 8 times, which is grossly misleading in the context of Trio. Collapse generally applies to funds that collapse, like Storm Financial, Westpoint and Great Southern. The money stolen from Trio was due to a fraud. Trio was not a collapse it was a crime. Official narrative tried to make Trio appear like: some financial advisors took large commissions to invest their clients in Trio; due to "poor financial advice"; SMSF trustees were "swimming outside the flags"; investors placed their savings in risky products; and the list goes on.

VOFF are concerned over ASIC and APRA's handling of Trio's entities and Directors (2004-2009). APRA's prudential work is veiled in secrecy and ASIC, evident from the Trio fraud, can orchestrate events to suit a desired outcome.

APRA and its influence on competitiveness

APRA's submission to the Productivity Commission dated 29 March 2018, write, '*APRA's mandate requires it to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, to promote financial system stability in Australia.*'

APRA's mandate enables it to "balance" market competition yet consumers are not entitled to learn what APRA do or don't do, such as when it carried out its prudential role with the Trio directors and Trio's entities. APRA's opaque operation invites questions about whether it has conflicts of interest between their supervised funds and other types of superannuation funds, such as self-managed superannuation funds (SMSFs). Particularly in light that it has, along with ASIC, The Australian Tax Office (ATO) and The Treasury Department, published articles that reflect

“scare mongering” of SMSFs. Why the collaborated effort to denounce SMSFs? VOFF research for same period, September 2009 to 2018 found not one positive article by the same agencies.¹

APRA’s submission to the Parliamentary Joint Committee (PJC) Inquiry dated 24th August 2011 point out, *‘APRA recognises that fraud within a superannuation fund can be a significant risk.’*²

VOFF do not know when APRA first recognized this risk because APRA do not give a date. However, VOFF did learn in April 2018 through the Freedom of Information process that APRA and the Treasury Department can not release certain information about Trio because according to APRA and Treasury, *“If this material were released, it would allow persons with malicious intentions to identify gaps and loopholes in the legislation that limit APRA’s powers as the relevant regulator. This would then enable such people to more effectively exploit these gaps and loopholes, prejudicing APRA’s effectiveness as a regulator.”*

The “gaps and loopholes” enabled the Trio perpetrator to deceive the entire financial system and direct nearly two hundred million Australian dollars to a secret location. Undetected, the Trio criminals dug a tunnel entering the bank vault from where money was stolen. They resurfaced outside of ASIC’s and APRA’s jurisdictional reach, and the money never found.

VOFF are alarmed because:

- 1) The government had known all along about the “gaps and loopholes”.
- 2) The government has kept the weaknesses secret.
- 3) Faced with the undetectable and undefeatable Trio fraud, does this give the government discretionary power to cover up the crime and heap unjustifiable blame on the victims?

The systemic failure of the financial system carried on charging unit holders fees, the Trio victims were charged fees for no assets³ as if the money was verifiable, when in reality it had vanished. The Banking Royal Commission heard that banking customers were charged, “fees for no services”, the Royal Commission needs to hear that Trio victims were charged, “fees for no assets.”

APRA’s influence on competition - intentional / unintentional

In December 2014 VOFF received under the FOI process, the attendees’ list for two meetings where APRA assisted in shaping the *Part 23 of the Superannuation Industry (Supervision) Act 1993* legislation.⁴ APRA attended these meetings prior to regulating the Trio entities (2004 to 2009) and was consequently equipped with the knowledge of the SIS Act.

Meeting No 1 July 17th 2003. Titled, *‘Review of Part 23 of the Superannuation Industry (Supervision) Act 1993 – Industry Consultation’*. Records of the sixteen attendees show:

- 4 – representatives from APRA;
- 4 - Treasury staff;
- 3 - members from the Association of Superannuation Funds of Australia;
- 1 – attendee from Corporate Super Association;
- 1 – attendee from the Institute of Actuaries;
- 1 – attendee from the Investment and Financial Services Association;
- 1 – member of the Law Council of Australia and
- 1 – attendee from the Trustee Corporations Australia.

¹ VOFF Trio Fraud Manual January 2018 page 55

² APRA Submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital 24 August 2011 page 8

³ VOFF Press Release Fees for No Assets

<http://www.mysuperrights.info/resources/VOFF%20Press%20Release%20Fees%20for%20No%20Assets%202.05.2018.pdf>

⁴ 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.

Meeting No 2 July 21st 2003. Titled, '*the Review of Part 23 – Industry Roundtable Meeting*' there were ten people in attendance:

4 – representatives of APRA;

2 – representatives from the Association of Superannuation Funds of Australia;

1 - attendee from the Australian Institute of Superannuation Trustees,

1 – representative from the Corporate Super Association;

1 – member from the Law Council of Australia and

1 – attendee from the Trustee Corporations Australia.

Although both meetings made important decisions that directly affected the security of SMSFs, no one informed SMSF trustees or was the market informed.

SMSFs could not have educated themselves about “fraud” and “fraud protection” prior to September 2009 because warnings about fraud attacking superannuation didn't exist. (Just like now, there are no warnings about “gaps and loopholes”.) There were no warnings or guidance literature from ASIC, APRA or the ATO about how investors can protect themselves from massive fraud. There was no guidance material or information about the Part 23 of the SIS Act prior the Trio fraud. Some financial advisors who had worked in the industry for over twenty years had never heard about Part 23. Nicholas John Sherry, a former Australian politician became angry during a Parliamentary Oversight over Part 23. He said he had seen this time and time again where Mum and Dad investors lost money and no one had ever heard about Part 23. Post-Trio fraud, new legislation now requires ASIC, APRA and the ATO, to indicate on their website that SMSFs do not have Part 23 cover meaning they are unprotected from fraud.

In 2006, APRA decided the Trio Directors are a “*bunch of incompetents*”⁵ but despite knowing how “fraud” would impact the SMSFs, did not inform the market. Asked about this in 2012, APRA's Ross Jones said they have no obligation to inform the market. Had APRA and ASIC communicated with each other (the PJC Inquiry found they didn't communicate) and shared this important point about a “*bunch of incompetents*”, the Trio fraud could have been stopped before it took off.

Incidentally, some of the Trio victims had started their SMSF with APRA. Around early 2000 the ATO became their regulator. Investors had no choice to change as APRA did that for them. There were no options or right of refusal on the SMSF trustees' part and the only difference was a reduction in fees from \$600 to \$45. There was no information of practical ramifications or the disadvantages in the changeover. Complaint about the absence in information was made to the PJC Inquiry.⁶ It is still not understood whether these APRA supervised SMSFs would have been entitled to “fraud” compensation before the ATO changeover. If so, how can a protection be removed without notification?

In 2016 the public were informed that, "*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.*"⁷ This statement was made without providing a single piece of supporting evidence. Surely the more than 16 million superannuation account holders deserve accurate, honest evidence based information.

The government got it wrong when Prime Minister, Malcolm Turnbull, Scott Morrison MP and Ms

⁵ 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

⁶ Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital May 2012 pages 115 and 116

⁷ Government decision on financial assistance relating to the collapse of Trio Capital
<http://kmo.ministers.treasury.gov.au/media-release/032-2016/>

Kelly O'Dwyer MP ruled out any need for a banking Royal Commission. They said Australia's banks are world best. The banking Royal Commission's hearings found differently. VOFF believe both sides of government have got it wrong about the Trio fraud.

ASIC and Competitiveness

The Trio fraud shows that ASIC did not carry out any background checks of the group of international brokers, some who had been barred from operating in the financial services industry in the United States or had operated / owned unlicensed funds and came to the attention of financial authorities in Spain, Austria, the Netherlands, the Isle of Wight, Hong Kong and New Zealand. ASIC allowed these people to purchase the Tolhurst business, which was a Superannuation Master Trust, as well as a private investment trust for non-super investors. ASIC never checked its own database as two years earlier ASIC had dealt with two of the brokers purchasing Tolhurst in another massive fraud against the Commonwealth. Exactly what is the role of ASIC if it is not to check their own information databases, is this not their core reason for existence?

ASIC's submission to the Productivity Commission dated 29 March 2018, write, '*... failure of competition to work effectively often results in conduct issues and adverse outcomes for consumers.*' '*...the fundamental purpose of competition in markets for financial products and services is to...*' '*...meet consumer needs and preferences.*'

Consumers' needs were not met by ASIC following the Minister of Superannuation and Financial Services, Mr Shorten's directive to "bring down" the financial advisor who had recommended Trio products to the Australian Workers Union's "slush" fund. ASIC and Mr Shorten orchestrated events for their own desired outcome.

The Trio fraud robbed 6,090 investors in exactly the same way, under exactly the same circumstances. Yet Mr Shorten said the APRA-supervised funds had their savings stolen through no fault of their own, but SMSFs lost their money because they placed their savings in troubled funds. Mr Shorten claimed, one group lost money through "fraud", and the other group lost money through "poor financial advice". Did Mr Shorten imagine that the Trio victims didn't know the difference between fraud and poor financial advice?

VOFF perceive that bringing down the man who had exposed the AWU's slush fund to the Trio fraud was revenge. He was 1 advisor out of 155 others who placed clients in Trio. In addition to the revenge, the SMSF trustees looked bad for taking the advice of a bad financial advisor. ASIC's action helped endorse its own narrative that SMSF trustees had followed "poor financial advice".

The Superannuation Industry (Supervision) Act 1993 (SIS Act)

Depending on the source, the Trio fraud lost \$123m, \$176m or \$194.5m and no one knows who benefited from Trio's unjust enrichments. No one knows what happened to the money. The APRA-supervised funds received compensation under the SIS Act, which gave/gives the impression that the Trio fraud was resolved. After restoring 90% of the affected victims, the crime was not investigated properly. Australians remain ignorant of what happened. Any diligent investor cannot learn from the Trio event. The Trio fraud is demonstration that even with the best due diligence, and the best available marketplace tools, consumers remain vulnerable to a Trio-type fraud.

The SIS Act & a comparison between Trio and Madoff victims

(Edited extract from the Trio Fraud Manual)⁸

The Bernard Madoff Ponzi saw about 24,000 victims⁹ lose \$17.5 billion.¹⁰ That equals an average

⁸ VOFF Trio Fraud Manual January 2018 page 58 and 68
<http://www.mysuperrights.info/trio-fraud-manual.php>

⁹ Jill Disis Madoff victims set to receive \$772 million payout Nov 9, 2017

loss of \$729,166. The Trio fraud saw 6,090 victims lose \$194.5 million, which equals an average loss of \$31,937. The Madoff victims including the hundreds of international banks some with very large losses did not encounter the same attack as Treasury and APRA made against SMSF victims - claiming they placed too many assets in Trio.

The Trio victims' assets were invested in a Managed Investment Scheme (MIS), prudentially supervised by APRA and licenced by ASIC. Unknown to everybody but the fraudsters, the Trio scheme used deception by failing to follow its Product Disclosure Statement and it did not diversify investments. Yet the victims were wrongly attacked for putting their money into an unregulated fund and putting their assets into one basket.

The Madoff Ponzi did have its Troll-like commentators lashing out at the Madoff victims. Four of Madoff's victims took their own life by suicide¹¹ including Madoff's son Mark. In Australia two Trio victims who were devastated by the fraud took their own life by suicide, a detail only known to friends of the deceased. There is no evidence of an official investigation into whether the Trio fraud was a contributing factor in their deaths. VOFF are not entitled to see the Coronary Report and a Freedom of Information request to ASIC about whether the deaths were acknowledged, had a reply that said no such documents exists. It's unlikely the Trio fraudsters know of the harm their theft caused.

The United States, United Kingdom, Canada and Hong Kong have The Corporate Manslaughter Act and company directors can be compelled to face their legal responsibility and be held accountable for any harm they cause victim(s). Australian law needs to acknowledge that the damage caused by predatory fraudsters can be a contributing factor that can lead to suicide.

As of the 19th December 2017, Trustee of the Madoff matter has recovered 73% of \$17.5 billion in lost principal.¹² In regards to the losses from the Trio fraud, not a single cent has been recovered. The compensation for Trio was about \$55m with a \$17m administration costs added. Administration fee is about 30% of the amount stolen and Mum's and Dad's superannuation meet this expense. The SIS Act makes it appear that no one lost any money as the loss is buffered across full membership of APRA supervised funds. But not all of the Trio compensated investors received 100 cents in the dollar, as it has been made out to be. Fees and other overheads eroded their compensation meaning that some APRA supervised funds received less than the percentage the Madoff victims' received.

In legal terms, the Madoff victims appear to be much better off than the Trio victims. The Madoff victims were not denied justice. Existing laws in the United States gave all the victims redress without discrimination. The SIS Act in Australia discriminated between the Trio victims. One group benefited at another groups' expense. Like Mr Shorten achieved with the AWU - Cleanevent deal that cost 5,000-odd workers as much as \$400 million.¹³ Also the Gillard Government's attempt to destroy the small business trucking industry by forcing the little guys to join the trucking giants.¹⁴ VOFF perceive the Trio fraud discrimination, supporting Union Industry Funds at the expense of SMSF investors, provided the opportunity to knock down their competitors. VOFF also question the authors' intention of SIS Act, whether consideration could have envisaged

<http://money.cnn.com/2017/11/09/news/bernie-madoff-government-payments/index.html>

¹⁰ Erik Larson Madoff Victims Near Full Recovery of Principal With Payout 19 December 2017

<https://www.bloomberg.com/news/articles/2017-12-18/madoff-victims-near-full-recovery-of-principal-with-new-payout>

¹¹ Arden Dier 4th Person Connected to Madoff Commits Suicide, Father of four jumped from NY hotel Mar 28, 2017

<http://www.newser.com/story/240439/4th-person-connected-to-madoff-commits-suicide.html>

¹² Erik Larson 2017 Op cit.

¹³ Anthony Klan 'Cleanevent staff lost \$400m under deal by Bill Shorten's AWU' July 8, 2015

<http://tinyurl.com/hwqmqae>

¹⁴ Grace Collier Union, Gillard rules driving owner-truckers out of business March 5, 2016

<http://tinyurl.com/l9nsuxw>

fraud within a MIS. A Minister of the Crown, acting without discrimination, may have looked at the bigger picture as the Trio damage was not solely in an APRA supervised fund.

Mr Shorten politicized Trio, meaning that the focus was shifted away from the crime. The 10% of uncompensated victims found they had no redress. The SIS Act trumped the Crimes Act, denying them “victims-of-crime” status. In the United States there are no signs of a cover up with the Madoff Ponzi. The United States Securities and Exchange Commission published an account about its failure to detect the Madoff Ponzi - they admitted their shortcomings. The insight into the SEC’s failure will probably assist policy makers. On the other hand, how ASIC and APRA supervised and regulated Trio and its entities remains a secret, will they admit to their shortcomings?

Using Trio as an example, the SIS Act stifles information about “fraud”. Mike Hill, ACT Super Management Pty Ltd wrote an account about the fraud (at a cost of about \$3 million). The uncompensated victims are not entitled to see the report although they are victims of that same crime. VOFF perceive that without public scrutiny of the Trio fraud, ASIC have greater scope to orchestrate events to suit its own desired outcomes. For whatever reason, ASIC did not provide vital evidence to the PJC Inquiry during when they were investigating the Trio fraud; ASIC did not provide vital evidence to the NSW Supreme Court hearing of the Trio perpetrator; ASIC misled the Trio victims including the public.

In the US, the market forces allowed the citizens to carry out their own investigations and so far reclaiming 73% of the Madoff losses. The search has not ended and the matter is not closed. In Australia, ASIC and APRA hold vital documentation that they will not release. Seemingly ASIC’s and APRA’s strangle hold on information, provides confidentiality for the International criminals but at the same time, prevents the Trio victims from launching their own investigations.

APRA’s supervised funds’ loss to the Trio fraud represents less than 0.01 per cent of total managed fund assets.¹⁵ This figure reflects an insignificant loss. Yet if there is a \$10 billion fraud it can be compared against the \$2.6 Trillion pool and extrapolated as also insignificant. What’s overlooked in monetary figures are the real life stories, often from the older population, where Trio destroyed lives and people’s dreams, and in some cases, led to the loss of the family home.

Fair competitiveness in superannuation

At the moment Australia is paradise for fraudsters including an ideal destination for money laundering through property. One of the Trio owners has a property in Australia that was valued many years ago at over \$30 million. He was connected with two major “fraud” incidents, no charges were made, he was not questioned over his role in Trio or is he banned on ASIC’s website from operating in the financial services industry. ASIC do not share the warnings reported by international regulatory authorities, as evident by allowing the brokers to purchase and operate Trio. Fraudsters benefit by information asymmetry offered by the corporate veil and secrecy through tax havens. Laws around superannuation are not protecting or helping consumers. Australia needs a version of the *Magnitsky Rule of Law Accountability Act*.

A Magnitsky type Act could be a road map for consumers, where questions about someone’s wealth can be asked, such as, please explain where the money came from for the \$30m property? Consumers could be offered fairer competitiveness by transparency into the alleged criminal underworld, linking connections and naming associations. Consumers need some form of basic security to protect their hard-earned savings.

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¹⁵ Review Of The Trio Capital Fraud And Assessment Of The Regulatory Framework, Department of Treasury 2013