

Mr J. Telford  
Secretary  
Victims of Financial Fraud (VOFF Inc)  
Mrs J. Butler  
VOFF Inc Executive  
February 7<sup>th</sup> 2018

**OAIC reference: MR17/00003**

**VOFF reference: 450**

Dear Commonwealth Ombudsman,

The Australian Office of the Information Commissioner's (OAIC's) letter dated January 30<sup>th</sup> 2018 refused to overturn the Australian Securities and Investments Commission (ASIC) decision concerning the Victims of Financial Fraud's (VOFF's) Freedom of Information request. The request was for ASIC's Appendix 4 document. ASIC declined to release the Appendix 4 document under s46(c) of the FOI Act. See the enclosed document titled '*Appendix 4 History*' for a summary of VOFF's attempts to access Appendix 4. The Information Commissioner (IC) declined to review our application under s54W(a)(i) of the FOI Act on the basis that our application lacks substance.

In VOFF's correspondence to ASIC and the OAIC we argue that the 15 million Australian superannuation account holders would benefit by learning what ASIC do or don't do to keep Australian superannuation safe. But the 'Public Interest' test is not a consideration in s46.

**VOFF argued for the release of Appendix 4:**

- Section 11B(4)(a) of the FOI Act, "*access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government*", but this is regarded as an irrelevant factor.<sup>1</sup>
- The Attorney-General's Department in referring to s46(c) said, "*it is not possible to be certain in all cases that documents would not be released in response to an FOI request. This is because each FOI request for access to documents needs to be considered on its individual merits.*"<sup>2</sup>
- The Appendix 4 exemption needs to be considered in its historical context. For example, "*It may be that information has ceased to be confidential, in the sense that a duty of confidence has come to an end.*"<sup>3</sup>
- The Attorney-General's Department noted, "*Documents protected under s 46(c) may include documents and records of evidence presented to Parliamentary Committees. However, in the absence of a resolution or standing order to the contrary it is not necessarily a breach of privilege to disclose these documents under the FOI Act.*"<sup>4</sup>
- "*It is a breach of privilege for a person to publish the evidence given to, or the report of, a parliamentary committee before the committee has reported to the Parliament or House, etc., or before the committee has authorised publication of the evidence of report.*"<sup>5</sup>

The PJC Inquiry handed down its findings in May 2012.

---

<sup>1</sup> [http://www.austlii.edu.au/au/legis/cth/consol\\_act/foia1982222/s11b.html](http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/s11b.html)

<sup>2</sup> Australian Government Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 Page 54 Ref. Parliamentary Librarian, Submission, pages 1-2.

<sup>3</sup> Australian Government, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010. *Johns v Australian Securities Commission* (1993) 178 CLR 408 per Gaudron J. <http://www.austlii.edu.au/au/cases/cth/HCA/1993/56.html>

<sup>4</sup> Australian Government Solicitor (AGS). Freedom of Information Guidelines, Exemption Sections in the FOI Act, Prepared for the Department of the Prime Minister and Cabinet As at 9 October 2009. Page 92.

<sup>5</sup> Peter Bayne Freedom of Information, The Law Book Company Limited 1984 Page 223

#### Access to Appendix 4

ASIC's interactions with Trio fails, "to promote transparency in financial markets"<sup>6</sup> as claimed by ASIC. In fact, the Trio matter is an example of ASIC operating in secret. The confidential status of Appendix 4 allows no account of ASIC's actions/inactions.

The closed system reflected by the exemption of Appendix 4, has allowed for the politicization of a crime by the then Minister for Financial Services and Superannuation, Mr Bill Shorten. The crime was ignored and ASIC followed the directive from the Office of Mr Shorten, to bring down the financial advisor who recommended Trio products to the Australian Workers Union (AWU) Officer's Election Fund (slush fund). The AWU's Officer's Election Fund is the union's war chest and its campaigning money. For the union fund money to be exposed to the Trio fraud is a blow to the heart of the AWU. This now explains the absurdity of attacking two family businesses (Tarrant's in Wollongong and Seagrims in Adelaide) out of the 155 financial advisors who had placed their clients into the Trio scheme. Vigorously attacking the family business that had recommended Trio to the AWU is more suggestive of outright retribution against an individual rather than addressing a serious crime against 6,090 clients.

With no transparency about how the Trio money disappeared or where it went, Mr Shorten was able to turn communities against each other. The systemic failure of the Australian financial system was ignored and the blame was pointed at financial advice. With no accurate account of the fraud, Mr Shorten exercised a union bias where one group benefitted at another groups' expense, similar to 'Cleanevent'. The Industry Funds benefitted with compensation while the non-APRA-regulated funds were accused of losing their own money because they placed it into troubled funds. This sent a very convenient (for Union dominated Industry Funds) market signal that SMSF's were high risk and fraud events like Trio would not be compensated for SMSF investors. Mr Shorten granted the APRA-regulated funds compensation, as the status of their loss was "fraud". Those in SMSFs and other investors were not compensated as the status of their investment was deemed a "collapse". How can two completely different causations be attributed to the same event?

There is no evidence to show that ASIC investigated equally the 155 financial advisors that placed client funds into Trio, VOFF perceive ASIC's action against 2 or 3 financial advisors as an attack against self-managed superannuation funds (SMSFs). Mr Shorten's union bias fulfills what the former Prime Minister of Australia, Mr Paul Keating urged the trade union movement to do, (as early as 1989) that was to use the billions of dollars generated by superannuation over the next 20 years to increase its own industrial clout. Keating added, 'the development of union-run superannuation funds would give the union movement "institutional muscle" to supplement its already substantial industrial strength.'<sup>7</sup> Mr Shorten as a Minister of the Crown had an obligation to serve the community equally, without discrimination, not to serve the union run funds while discrediting the non-union funds by suggesting they were "swimming outside the flags". Mr Shorten's misleading statement failed to acknowledge that the investors fulfilled the requirement set down by ASIC, ensuring they were indeed investing between the flags. ASIC did nothing to correct the misinformation.

There is no evidence that a proper forensic investigation was carried out into the Trio fraud but there is evidence starting from the very beginning of the Trio crisis that the finger was pointed at financial advisors. Appendix 4 might offer some understanding of why ASIC showed no interest in a proper investigation; show why ASIC did not acknowledge the systemic failure of the financial system relating to the Trio fraud although the PJC Report<sup>8</sup> and Mr Medcraft did refer to the systemic failure. Appendix 4 might justify why ASIC withheld vital information from the PJC Inquiry who were investigating the Trio

---

<sup>6</sup> <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Our%20role>

<sup>7</sup> Michael Millett Sydney Morning Herald *Keating sees super as union shield* Sept 28,1989 page 4.

<sup>8</sup> PJC Report May 2012 page 146. The PJC established to investigate the Collapse of Trio Capital Limited (not support Mr Shorten's revenge) and to their credit found, 'the fraud specifically and principally targeted superannuation savings, and appears to be designed to take advantage of vulnerabilities in the superannuation system.'

fraud; and why ASIC withheld vital information from the NSW Supreme Court.<sup>9</sup> The omission of information from the NSWSC may have benefited the perpetrator.

ASIC and Mr Shorten's focus on financial advice as the reason Australians lost money in Trio appears to have influenced others. For example, MP Deb O'Neill's comment addressed to ASIC during the February 25<sup>th</sup> 2015 Estimates Hearing in Canberra, ignores that there was a serious crime when she said, *"I have made it my mission to ask and put on the record at estimates on every occasion so far that I have been able to be here; what is happening with Trio? Could we get an update of what is available to be said in the public domain, because those people are still very much suffering from the impact of bad financial advice?"*<sup>10</sup>

Ms O'Neill's statement aligns and echoes the disingenuous, inaccurate and misleading comments made by Stephen Jones, MP, Federal Member for Whitlam; and Sharon Bird MP, Federal Member for Cunningham. Comments such as, *'The reason these people lost their money is because they followed some very poor financial advice' .... 'What sort of financial advisor in their right mind would encourage someone to put their entire life savings into a single asset?'*<sup>11</sup> and *'not everyone invested in Astarra'*.<sup>12</sup>

Were the above comments made, knowing that the AWU slush fund was exposed to the Trio fraud? Such comments are tactics used in bullying victimization. Discrediting remarks against two people, driven to such despair over their loss in Trio, that they ended their life by suicide, may have been a contributing factor that led to their deaths.

Such comments misled the Australian public and are comments that have no place in a criminal situation.

It is apparent that ASIC decided early in the discovery of the Trio Fraud that nothing could be done. In documents released under the Freedom of Information laws, ASIC's letter to the Australian Federal Police (AFP) dated June 21st 2012, says *'financial advisors provided recommendations to their clients due to high commissions which were paid by Trio'*. The AFP noted in its own recommendations that, *'the material provided by ASIC does not provide sufficient information to support an investigation into any Criminal Code Act 1995 offences.'*<sup>13</sup>

At the 2011 Hearing into Trio Capital, The PJC Chairman, Mr Ripoll questioned APRA about being outside of regulatory reach.

Mr Keith Chapman, Executive General Manager, Supervisory Support Division, APRA explained that *'If Fred did something wrong and we do not have the power to do anything about it, we either investigate to determine that or take action.'*

Chairman: *'Do you refer that on when you do not?'*

Mr Chapman: *'To the extent that we are able to, yes. This will be hearsay on my part, but I believe that ASIC have referred some of the international names to other enforcement agencies around the globe, because they are the ones with reach in that area.'*<sup>14</sup>

At the same Hearing, Senator Sue Boyce, a former member of the Australian Senate for Queensland asked, *'Is there anyone in Australia in the category of being outside the reach of the regulatory bodies and yet has engaged in wrong?'*

---

<sup>9</sup> VOFF Press Release Sept 25 2017

<http://www.mysuperrights.info/resources/VOFF%20Press%20Release%20Sept%2025%202017.pdf>

<sup>10</sup> Proof Committee Hansard Senate Economics Legislation Committee Estimates 25 February 2015 Canberra page 98

<sup>11</sup> Thompson, Angela Illawarra Mercury Trio anger spills over as victims protest 16th February 2013

<sup>12</sup> Meeting with VOFF delegation in Sharon Bird's Office, Wollongong July 13, 2012

<sup>13</sup> VOFF FOI No 373 to the AFP July 28 2015 17 pages and 2 pages <http://www.mysuperrights.info/resources/CRM2016-45%20Documents.pdf>

<http://www.mysuperrights.info/resources/Schedule%20-%20Released%20Documents%20-%20CRM2016-45.pdf>

<sup>14</sup> Commonwealth of Australia Official Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services Collapse of Trio Capital 30 August 2011 Page 40

Mr Ross Jones, Deputy Chairman, APRA: *'That is probably a difficult question to answer. We are doing an investigation now looking back at a series of individuals. I am not certain that we could say with absolute certainty that every single individual associated with these transactions will be caught.'*

Senator Boyce: *'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.'*<sup>15</sup>

In 2013, during a Parliamentary Joint Committee Statutory 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."*<sup>16</sup>

This is a unique acknowledgement of ASIC's limitations in the Trio investigation and contrary to the above Hearing that gave the impression that the regulators have ways to act and respond in international jurisdictions.

To suggest that Mr Medcraft can negotiate on behalf of Australia and the 15 million Australian superannuation account holders on issues about financial security is problematic when ASIC under Mr Medcraft's watch, wrote the Appendix 4 document which remains secret. Australians are not entitled to learn about ASIC's actions/inactions. Mr Medcraft's immense responsibility and to fix Australia's jurisdiction weaknesses appears to be outside of Australia's democratic processes.

From a 2018 perspective, it is now apparent that: 1) incorrect information offered at the Trio Hearings; 2) misleading statements and suggestions made at Senate Oversights about how Trio will be managed and the suffering due to poor financial advice; 3) vital information withheld from the PJC inquiry; 4) vital information withheld from the NSWSC; 5) Mr Shorten politicized the crime; 6) the investigation of the crime was compromised; 7) no sign of interest to solve the crime; 8) no sign of interest to retribute the uncompensated Trio victims; 9) two key overseas Trio operators who managed a Trio underlying fund where about \$80 million disappeared were not questioned over their role in Trio; 10) other Trio principals that live overseas, they too were not questioned. The above 10 points are just some of the issues surrounding the Trio matter where it appears there is an absence of integrity.

Reason not to solve the crime or to compensate the uncompensated Trio victims is because their collateral damage adds to the market signal, warning that SMSFs are dangerous. In the story about Trio, finding any acknowledgement of the weaknesses in the Australian financial system is difficult but the issue about blaming financial advice is prevalent and misleading. The largest superannuation fraud in Australia's history appears to have attracted a large amount of misinformation. Section 46 prevents public disclosure of information that might put light on ASIC's interaction with Trio and allow for informed and educated decisions to improve financial safety and security.

Without transparency, political opportunism, misinformation and bullying victimization have a place in the Australian financial system.

VOFF call for an independent investigation of the Appendix 4 document including an investigation into Mr Shorten and ASIC's handling of Trio.

Yours Sincerely  
John Telford  
Secretary VOFF Inc

---

<sup>15</sup> Commonwealth of Australia Official Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services Collapse of Trio Capital 30 August 2011 Page 41

<sup>16</sup> Parliamentary Joint Committee on Corporations and Financial Services, Statutory Oversight of the Australian Securities and Investments Commission, Number 2, May 2013. Page 47