

The Madoff Ponzi v Trio a Government in Chaos.

John Telford 15 July 2019

Throughout this document the term “Trio victims” refers to the 690 (8%) self-managed and direct investors out of the total 6,090 consumers who were exposed to the Trio fraud. In 2011 the then Minister for Superannuation, Bill Shorten granted compensation for 5,350 (92%) members in the Australian Prudential Regulatory Authority (APRA) supervised funds under the Superannuation Industry (Supervision) Act 1993 (SIS Act). That 92% simply vanished into the background. It’s the remaining 8% of unresolved victims, retired schoolteachers, steelworkers, coalminers, small business owners, labourers, professional and semi-professional workers who present this document.

1. THE BERNARD MADOFF PONZI:

1.1 About Berni Madoff,

Madoff’s Ponzi started when he concealed his losses in the 1960s and again in the 1990s, hoping that he would recover the losses with no one the wiser. Before the Ponzi was uncovered, Madoff was a highly respected member of the NASD Board and chairman of the NASDAQ market.¹ His connection with the financial security regulators helped instil confidence with new investors.

1.2 About the Ponzi,

The wealth management arm of Madoff’s business was an elaborate Ponzi scheme, discovered in late 2008 and by March 2009 Madoff had pleaded guilty to 11 federal crimes. *On June 29, Judge Chin sentenced Madoff to 150 years in prison. Chin said he had not received any mitigating letters from friends or family testifying to Madoff’s good deeds, saying that “the absence of such support is telling.”*²

1.3 Who are the Ponzi victims?

Madoff victims were international banks to ordinary people. Eight investors lost a potential \$21.32 billion and eleven investors lost between \$100 million and \$1 billion.³ *Most victims were average Americans who worked hard and had their life savings stolen from them in the blink of an eye.*⁴ The only difference imposed on the Madoff victims is in the calculating of losses. Loss was based on the investor’s original investment. The reported profits were seen as fraudulent.

1.4 Madoff victim's rights,

Madoff victims were reminded of their “Rights” under the Justice for All Act of 2004, i.e., *“The right to full and timely restitution as provided in law.”* The U.S. Attorneys Southern District of New York informed the victims, *‘please be assured that all those involved are working diligently to investigate this matter and to locate and preserve assets that can be used for restitution to defrauded investors.’*⁵

2. THE TRIO CAPITAL FRAUD:

2.1 About the Trio perpetrator,

¹ Diana B Henriques The Wizard of Lies : Bernie Madoff and the Death of Trust New York 2017 page 86 87

² https://en.wikipedia.org/wiki/Madoff_investment_scandal Ref. Zambito, Thomas; Martinez, Jose; Siemaszko, Corky (June 29, 2009). "Bye, Bye Bernie: Ponzi king Madoff sentenced to 150 years". New York: Nydailynews.com. Retrieved March 16, 2010.

³ https://en.wikipedia.org/wiki/Madoff_investment_scandal

⁴ Erin Arvedlund The Club No One Wanted To Join, Madoff Victims in their own Words. 2010 ISBN: 978-1537106922

⁵ U.S. Attorneys NY, United States V. Bernard L. Madoff And Related Cases August 21, 2015

<https://www.justice.gov/usao-sdny/programs/victim-witness-services/united-states-v-bernard-l-madoff-and-related-cases>

Australian based Canadian, Shawn Richard was the foot soldier who collaborated with an International group to set up and operate the Trio fraudulent scheme. His working background was a boiler room operation based in the Philippines.

2.2 About the fraud,

Assets in Trio were invested in a Managed Investment Scheme (MIS) designed to diversify investments as according to the Product Disclosure Statement. But unknown to anyone other than Trio director, Shawn Richard, assets were not diversified. The PDS misled consumers despite being approved by The Australian Securities and Investments Commission (ASIC) and the reputable legal firm Baker and McKenzie. Consumers rightly relied on the fact that ASIC licensed and APRA carried out prudential reviews of Trio and research and star-rating firms wrote favourable reports. Justice Garling in sentencing Mr Richard on two charges of dishonest conduct said, *"I regard the criminality as very serious indeed. Whilst I am not prepared to say it is an example of the most serious criminal conduct which offences of this kind encompass, it is nevertheless very serious. I would place it as nearing that upper range of criminality for both of the offences."*⁶

2.3 Who are the Trio victims?

Mr Shorten divided the total into 92% who are "victims through no fault of their own" and 8% who placed their money "directly into troubled funds".⁷ Perceived vested interest accused the 8% "you can't have your cake and eat it too",⁸ they were also "swimming outside the flags".

2.4 Trio victim's rights,

Trio fraud victims were ignored. No one informed the victims that they had a right to submit a Victim's Impact Statement. When Shawn Richard was sentenced for his dishonest role in the fraudulent Trio scheme, Justice Garling, in the NSW Supreme Court stated, *"The material tendered by the Crown did not establish the identity of any of the victims of the offences of Mr Richard. Obviously, it can be said that those who invested in one or other of the superannuation funds of the Trio Capital Group who were promoted and run by Mr Richard were victims. However, no individual detail of the personal circumstances of those investors is provided."*⁹

3. COMPARISON BETWEEN MONEY TRAILS:

The Bernard Madoff Ponzi, about 24,000 victims¹⁰ lost \$17.5 billion¹¹ average loss \$729,166.

The Madoff victims were respected.

The 6,090 Trio consumers lost between \$122 million¹² to \$194.5 million¹³ average loss between \$20,032. to \$31,937.

The Treasury Department and APRA wrongly accused the 8% of Trio victims of investing their money into an unregulated fund and placing their assets into one basket. Trio Capital was both the trustee of an APRA regulated superannuation fund as well as the Responsible Entity of a managed investment scheme (MIS) regulated by ASIC.

Market forces in the Madoff case worked for the victim's benefit. As of the 19th December 2017,

⁶ Regina v Shawn Darrell Richard [2011] NSWSC 866 (12 August 2011)

⁷ Washington, Stuart SMH 'Fraud victims get \$55m back, but some left empty-handed' April 13, 2011
<http://www.smh.com.au/business/fraud-victims-get-55m-back-but-some-left-emptyhanded-20110412-1dcpn.html>

⁸ <http://www.smh.com.au/money/planning/no-safety-net-on-smsf-losses-20130326-2gs7u.html>

⁹ Regina v Shawn Darrell Richard [2011] NSWSC 866 (12 August 2011) under 'The victims of the offences: s 16A(2)(d) Crimes Act 1914' at 68,

¹⁰ Jill Disis Madoff victims set to receive \$772 million payout Nov 9, 2017

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

¹¹ 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>

¹² Australian Crime Commission Organised Crime In Australia 2013 page 57

¹³ Financial System Inquiry: Submission by the Australian Securities and Investments Commission April 2014 page 192

Trustee of the Madoff matter has recovered 73% of \$17.5 billion in lost principal.¹⁴
As of 2019, not a single cent of the stolen Trio money was recovered, nor to VOFF's knowledge is anyone looking!

There is no secrecy around the Madoff Ponzi but the Trio victims were left in the dark about where their money went. ASIC used terms like "lost" or "disappeared" to explain how money vanished.

There is no sign that the US government sided with Madoff or misled the public about the Ponzi. There are signs that the Australian government orchestrated events around Trio to achieve a desirable outcome.

Did the Australian government throw consumers under the bus to hide the fact that ASIC and APRA got it wrong?

4. SURROUNDING ISSUES:

4.1 Details available about Madoff Ponzi,

Bernie Madoff's brother Peter and Peter's daughter Shana Madoff worked in compliance at the Madoff firm. Around 2003 she dated SEC attorney Eric Swanson who she later married. After the Ponzi was uncovered, the Inspector General did check this matter for 'conflict' but found no evidence that the couple's relationship compromised the SEC agency's examinations of the Madoff firm.¹⁵

4.2 Lack of details available about Trio,

VOFF is aware of a person who's not mentioned in either the PJC Report,¹⁶ Treasury's Review of Trio, ASIC's media statements or the many court documents. This person had worked for the former Insurance and Superannuation Commission, [now The Australian Prudential Regulation Authority (APRA)] as a Compliance Officer and this same person became Compliance Officer for Trio. Insider knowledge perhaps?

4.3 Financial stress recognised after Madoff Ponzi,

It is acknowledged that 4 individuals took their life by suicide as a direct result of the Madoff Ponzi. Their names are publicly available.

4.4 Financial stress recognised after Trio,

There is no acknowledgement that the Trio fraud directly contributed to loss of life. Family and friends know of at least two individuals who ended their life following the Trio fraud. Their names are not publicly available. Under Freedom of Information law, Treasury and ASIC said in 2017 that no document exists about suicides over the Trio fraud.

5. REGULATORY ACCOUNTABILITY:

5.1 Regulatory handling of Madoff Ponzi (transparency),

In the same week that the Bernie Madoff's Ponzi made news, SEC chairman Christopher Cox pointed out that SEC investigators and law enforcement were going through information to discover the complicated steps that Madoff took to deceive investors, the public and regulators. Cox acknowledged that Harry Markopolos gave the Commission information alleging the Madoff Ponzi in 1999, but the SEC staff never recommended the Ponzi to the Commission for action. Cox expressed concern over the decade of multiple failures as the Commission failed to thoroughly investigate the allegations of Madoff's wrongdoings. The SEC published a 477-page account of its

¹⁴ Erik Larson 2017 Op cit.

¹⁵ Wikipedia, Shana Madoff

https://en.wikipedia.org/wiki/Shana_Madoff

¹⁶ PJC Report May 2012

failure to detect the Madoff Ponzi.¹⁷

5.2 Regulatory handling of the Trio fraud (cover up),

Under the ASIC Act, ASIC maintains corporate confidentiality. Under the APRA Act, APRA classifies all prudential documents as exempt.

6. SUPPORTING VICTIMS OF CRIME:

6.1 Assisting Madoff victims,

Authorities assisted the Madoff Ponzi victim every step of the way. The US Attorneys Office said, *"Crime victims have a right to be heard in connection with sentencing. If you would like to speak at the sentencing of any of the defendants, Judge Swain has ordered that victims notify the U.S. Attorney's office..."*¹⁸ There was also government assistance to help the Madoff victims draw up and submit claims for compensation.¹⁹

6.2 Assisting Trio victims,

The Trio victims have to date received no assistance.

7. AUSTRALIAN GOVERNMENT PROTECT REGULATORY FAILURE:

7.1 APRA fail to serve consumers,

Parliamentarians in Australia with no background in law enforcement or forensic accounting are influencing decisions made about financial theft in banking and financial services industry. Decisions made by Bill Shorten, Stephen Jones MP, and Ms Deborah O'Neill MP politicized a serious crime, they focused on poor financial advice.

Liberal Finance Minister Mathias Cormann, and Ms Kelly O'Dwyer MP, had ample opportunity to call for an accurate account into what happened surrounding Trio but chose to do nothing. On April 1st 2016 Ms O'Dwyer released a statement saying the government absolved ASIC and APRA of any blame for their conduct over Trio. Ms O'Dwyer gave no basis for the government's findings. Former Senator Nick Sherry and Paul Fletcher MP tried to bring accuracy to the Parliamentary Joint Committee however ASIC had withheld vital evidence from the Inquiry.

At first the Coalition fought hard to prevent a Banking Royal Commission. But Senator Barry O'Sullivan wanted a Royal Commission with 3 Commissioners and the power to investigate criminality. Fearing O'Sullivan's royal commission would damage the banking and financial sector, the Turnbull / Morrison government colluded with the big banks to get in first. Prime Minister Scott Morrison, APRA's Wayne Byres and Governor of the Reserve Bank of Australia, Philip Lowe, created a Banking Royal Commission with 'Terms of Reference' for Commissioner Kenneth Haynes that assured financial crimes would NOT be dug up.²⁰

While APRA helped lighten the Banking Royal Commission Terms of Reference, it had already dealt with bad behaviour of the Commonwealth Bank's superannuation arm for the last 4 years. The CBA had given APRA a breach notice for failing to shift 15,000 customers in to low-fee MySuper accounts around 2014. The bank had failed by the deadline to move customers out of the bank's high-fee legacy products. *'APRA had all the evidence it needed to take the bank to court, get remediation for the customers, and send a message to the rest of the industry that this type of behaviour would not be tolerated. But that was not what happened. APRA didn't even demand that*

¹⁷ The 477-pages U.S. Securities and Exchange Commission Office of Investigations - Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme - Public Version - August 31, 2009 Report No. OIG-509

¹⁸ U.S. Attorneys Southern District of New York August 21, 2015

<https://www.justice.gov/usao-sdny/programs/victim-witness-services/united-states-v-bernard-l-madoff-and-related-cases>

¹⁹ Wikipedia, Shana Madoff

https://en.wikipedia.org/wiki/Shana_Madoff

²⁰ Michael Roddan The People vs The Banks Melbourne University Press 2019 page 1

the customers be transferred immediately to the low-fee fund. Instead, the regulator oversaw a process that allowed members to be transferred over more than three years, during which time law was continuously broken'.... 'Call centre transcripts, which showed customers were misled into choosing the high-fee funds, were even reviewed by APRA, but the regulator gave CBA the tick of approval'.²¹

APRA did the same in 2006 when it warned Trio directors about a conflict of interest breach. APRA came to the conclusion that the Trio directors were a 'bunch of incompetents'.²² APRA warned no one.

APRA's concern for Industry above consumer safety can be seen in the way APRA assisted with the writing of the Part 23 legislation in 2004. The attendees with APRA were from Industry. No consumer or SMSF representatives attended. The "fraud" protection legislation protected APRA supervised funds only. APRA knew that all other superannuation funds faced financial ruin if "fraud" occurred, yet APRA informed no one about the Part 23 legislation. Members of VOFF can recall that their superannuation fund was regulated by APRA, then with no consultation, those same funds became non-APRA regulated funds and regulated by the Australian Tax Office. There was not even a letter to inform of the change. From this period not a single piece of evidence can be found to show that consumers were warned about organized financial fraud in superannuation or were they informed about the Part 23 legislation. No one was warned that non-APRA regulated funds were not protected against "fraud".

Dr Wilson Sy, expert in economics, finance and applied mathematics was a Senior Research Advisor at ASIC for 3 years and 6 years with APRA. From his inside experience he claims the regulators are there to protect and to maintain a stable financial system, they are not there to serve the consumers or the community at large.²³

Who are these agencies accountable to?

7.2 ASIC fail to serve consumers,

In 2001-2, to assist in a court case against a Queensland man who faced charges for "fraud" against the Commonwealth, ASIC subpoenaed documents from a Hong Kong business. That same HK business was owned and operated by the same men who two years later owned and operated the Trio Capital scheme.

ASIC's second dealing with the Hong Kong businessmen was to secure documentation from "Global Consultants and Services Ltd" (GCSL), the Hong Kong-based custodian of the Trio funds. GCSL received all the money from Australia and supposedly distributed to Trio's underlying funds. The tranche of documents ASIC received from GCSL were kept out of sight from the Parliamentary Joint Committee and the NSW Supreme Court. ASIC had a Memorandum of Understanding with the Securities & Futures Commission of Hong Kong to keep the documents confidential. Courts have overruled privileges when it's alleged the legal advice was used in furtherance of an illegal or fraudulent activity.²⁴

ASIC has previously dealt with the same Hong Kong businessmen over another fraud matter. No charges were laid in regards to either matter. Had ASIC checked with its fellow regulatory agencies around the world, they would have learnt that the same Hong Kong businessmen were involved with other failed financial schemes in Europe, United Kingdom, New Zealand and United

²¹ Michael Roddan The People vs The Banks - Page 279.

²² Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Collapse of Trio Capital. (30.8.2011) - Sydney p 38

²³ An Insider Speaks To The People In the Interests of the People Published on Jun 9, 2019
<https://www.youtube.com/watch?v=5YyrTt0l3dA&feature=youtu.be>

²⁴ U.S. v. Zolin, 491 U.S. 554, 562-63 (1989)

States. ASIC appear to be protecting these businessmen, the documents should not remain exempt, and an independent assessment needs to be carried out.

The initial fraud was virtually lost under the weight of all the surrounding charges. Finding that the Trio operators in Australia breached the law was like “picking the low hanging fruit”. But no one asked who are the people that designed the Trio fraud. The charges made against the Trio operators in Australia seemed to distract from the initial fraud.

ASIC ran a court case against only 1 out of the 155 advisors who had advised clients to invest in Trio. It was this “one” particular advisor who had recommended Trio products to the Australian Workers Union’s “slush fund”. The AWU lost money to the fraud and ‘bringing down’ the advisor required ASIC to rely on the man guilty of the Trio crime. Shawn Richard was jailed for dishonesty, and yet this dishonest individual’s testimony managed to bring down this “one” advisor when the other 154 advisors gave the same advice to their clients. Bringing down the advisor was seen as revenge. This may sound like a conspiracy theory but realistically this is gross injustice at its best!

Barrister Niall Coburn stated, *["You can't have people lying to ASIC because it undermines the whole system we have to protect the trillions of dollars we have put away in superannuation for our elderly."](#)*²⁵

The Trio director lied to ASIC which allowed the organised gang to siphon investor’s savings.

When ASIC announced it had closed the book on the Trio matter, the statute of limitations had expired for any civil action, how convenient, it’s almost as if the timing was for the benefit of the International criminals.

7.3 Treasury fail to serve consumers,

Martin North of Digital Finance Analytics observed that the 2018 Banking Royal Commission's Interim Report found the financial services industry driven by greed, driven by profit, not driven by outcomes for customers and regulators not doing their job. But the Final Report didn’t echo these concerns. Dr Sy explained that Treasury has the final say, and writes its own conclusion.²⁶

Denise Brailey of the Banking and Finance Consumers Support Association (BFCSA), attended the 2005 Macquarie Bank seminar where financial advisors were encouraged to target the asset rich income poor (ARIP) - generally the older population who own a home, and sign them up with a loan. Treasurer Peter Costello attended the same asset stripping seminar. The movement of assets was seen as being ‘good for the economy as it moves money around’.²⁷

8. POLITICIZING THE TRIO FRAUD:

The Superannuation Industry (Supervision) Act 1993 (SIS Act) became a politicizing tool when it treated people in the same fraud differently. One group of Trio victims benefited at another groups’ expense. The Australian Workers Union (AWU) achieved a similar outcome with the Cleanevent deal, this cost 5,000-odd workers as much as \$400 million.²⁸ Then, the Gillard Government attempted to destroy the small business trucking industry by forcing the little guys to join the trucking giants and their Unions.²⁹

²⁵ <https://www.smh.com.au/business/banking-and-finance/asic-lacks-courage-on-enforcement-says-former-investigator-20180425-p4zbn0.html>

²⁶ An Insider Speaks To The People In the Interests of the People Published on Jun 9, 2019
<https://www.youtube.com/watch?v=5YyrTt0I3dA&feature=youtu.be>

²⁷ Denise Brailey on the mortgage fraud that will smash Australia's financial system! Sep 6, 2018
<https://www.youtube.com/watch?v=hofV3Y1cGxl>

²⁸ Anthony Klan ‘Cleanevent staff lost \$400m under deal by Bill Shorten’s AWU’ July 8, 2015
<http://tinyurl.com/hwqmqae>

²⁹ Grace Collier Union, Gillard rules driving owner-truckers out of business March 5, 2016
<http://tinyurl.com/l9nsuxw>

Part 23 of the SIS Act should not undermine a proper forensic investigation into a major financial fraud. It should not prevent the law enforcement agencies from charging financial criminals or prevent the clawing back the ill-gotten gains. The SIS Act should protect all superannuation including SMSF's. Part 23 used was a Market Signal to warn superannuation account holders that 'all superannuation accounts other than APRA supervised are dangerous'. The irony is that funds protected by the SIS Act face exactly the same dangers.

9. ACCURATE ACCOUNT:

In June 2019 APRA deputy chair Helen Rowell said, *"APRA has longstanding concerns about the ability of parties to gain control of a superannuation licensee through the 'back door', without meeting the requirements of a stringent approval process,"... "These concerns were heightened after this loophole contributed to the fraud that precipitated the collapse of Trio Capital in 2009."*³⁰

The 'back door' loophole highlights one of the weaknesses that the Trio gang exploited. Certainly Trio was a "crime", not poor financial advice or product failure.

In July 2019 Treasury released a document to VOFF Under Freedom of Information law that has the following changes made by ASIC and APRA after the Trio fraud. The many changes support VOFF's claim of systemic failure.

"In 2010 ASIC set out a forward plan to improve, where possible, the regulatory framework in light of the events that led to the collapse of Trio Capital.

Following this forward plan, ASIC has:

- increased the financial requirements that apply to managed investment schemes (refer: Consultation Paper 140 Responsible entities: financial requirements and Regulatory Guide 166 Licensing: Financial Requirements);*
- issued regulatory guidance to improve disclosures made by hedge funds (refer: Regulatory Guide 240 Hedge Funds: improving disclosure);*
- strengthened guidance applying to research houses (refer: Regulatory Guide 79 Research report providers: Improving the quality of investment research); and*
- reviewed the compliance audit plans for a limited number of managed investment schemes.*

In addition ASIC also:

- established a dedicated page on its website to assist Trio investors and also provided warnings on its MoneySmart website about limits to compensation for self-managed superannuation fund investors;*
- provided 2 public market updates regarding Trio Capital (refer: Media Release 12-116 ASIC provides update on Trio and Media Release 13-294 Update on Trio investigation);*
- reviewed and improved existing working relationships ASIC has with other regulators. For example, ASIC entered into a Memorandum of Understanding with the AFP and improved its liaison arrangements with APRA;*
- reviewed more generally financial advice provided to self-managed superannuation fund investors (refer: ASIC report 337 SMSFs: Improving the quality of advice given to investors);*

³⁰ Sarah Simpkins APRA preparing for super stakeholder regulation 25 June 2019
<https://www.investordaily.com.au/regulation/45173-apra-preparing-for-super-stakeholder-regulation>

- reviewed and consulted on risk management arrangements that managed investment schemes have in place (refer Report 298 Adequacy of risk management systems of responsible entities and Consultation Paper 204 Risk management systems of responsible entities);

- assisted the Corporations and Markets Advisory Committee ('CAMAC') in preparing a paper discussing potential legislative changes that could be made to the regulatory framework for managed investments (refer CAMAC March 2014 Discussion paper Managed Investment Schemes); and

- issued a report on regulating complex products including hedge funds (refer Report 384 Regulating Complex Products).

APRA

Since Trio's collapse there have been a number of significant changes to the APRA regulated superannuation landscape, most importantly: better protections introduced as part of the Stronger Super Reforms, such as introduction of Prudential Standards making powers for APRA as well as enhanced reporting requirements. Since the passage of these legislative changes, APRA has released new prudential standards which directly address issues identified related to the collapse of Trio, namely:

SPS 521 Conflicts of Interest

SPS 220 Risk Management

SPS 530 Investment Governance

SPS 231 Outsourcing release in June 2015 of Prudential Practice Guide SPG 223 Fraud Risk Management which includes guidance on how to mitigate fraud related investment risks in superannuation."

The above information illustrates that ASIC and APRA have taken steps to prevent another Trio type fraud, surely an admission to the presence of loopholes. The information also illustrates that the trio victims didn't stand a chance against fraudsters who deceived the entire system. Consumers were herded like sheep, ready to be fleeced unquestioningly.

It's time the government recognised that the 8% of Trio victims who were encouraged by the government into superannuation with tax incentives to save for retirement were no different to the other 92% who received compensation.

In summing up, APRA, ASIC, Banks and Research houses should be held responsible for the Trio fraud not the investors, they trusted the fact that their Government and its agencies were protecting them. Had the Government agencies not handed Shawn Richard a Licence to operate Trio and the Banks and Research Houses had done their due diligence in a professional manner, the victims would not be in the position they have been placed in.

All of these entities had "one job", just one, to make the Australian Financial Industry safe and if they had of done that "one job" VOFF would not be writing this letter appealing for justice and compensation, it is only fair and the Australian thing to do.

The government expended enormous time and expense to discredit the 8% group and make it appear they were robbed by their own failed due diligence while keeping ASIC and APRA's gross negligence secret, for example see Treasury's 'Review of the Trio Capital Fraud and Assessment of the Regulatory Framework' which focuses on details that have nothing to do with the fraudulent crime, indication of a government in Chaos.

John Telford

Secretary VOFF Inc

Email: johnt@1earth.net