

Submission to the Review of the Australian Financial Complaints Authority**Contents**

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17 March 2021

To AFCA Review Secretariat,

AFCA

The Financial Ombudsman Service (FOS) Commenced on 1 July 2008 as an independent dispute resolution scheme, formed through the consolidation of:

- The Banking and Financial Services Ombudsman (BFSO)
- The Financial Industry Complaints Service (FICS)
- The Insurance Ombudsman Service (IOS)

The Australian Financial Complaints Authority (AFCA) was established on 1 November 2018 in response to the Review of the financial system external dispute resolution and complaints framework and replaced the three dispute resolution bodies:

- The Financial Ombudsman Service (FOS)
- The Credit and Investments Ombudsman (CIO)
- The Superannuation Complaints Tribunal (SCT).

AFCA's website says AFCA is '*a free, fair and independent dispute resolution (EDR) scheme*'.¹

Attempt to lodge complaint to AFCA

Victims of Financial Fraud (VOFF Inc) [a group of people who were exposed to the Trio Capital Limited (Trio) fraud formed a campaign group to seek justice] submitted 9 complaint letters to AFCA [starting 7 November 2018 to 1 October 2020]. The submissions point out systemic issues that exacerbated the harm caused to consumers exposed to the fraudulent Trio scheme. VOFF's correspondence continued for over twenty months, with AFCA refusing to look at VOFF's submission because Trio wasn't a member of AFCA. Over that period, VOFF tabled complaints with supportive documentation. In mid 2020, AFCA explained that Trio needed to become an AFCA member before it could answer correspondence or accept submissions.

¹ <https://www.afca.org.au/about-afca>

VOFF made inquiries. One of the big accounting firms quoted \$50,000 to re-register Trio Capital Limited. VOFF checked with ASIC about re-registering Trio. ASIC said it might not agree to the issuing of an investment license (responsible entity) considering Trio's previous history.

VOFF wrote and asked AFCA whether Trio needed an ASIC operating license. Also asking if AFCA was to make a determination in the Trio victims' favour, who pays the compensation?

AFCA refused to answer. It reiterated that Trio needed to be an AFCA member before it can answer. This Catch-22 stalemate is not what the Trio victims expected from an EDR scheme supposedly set-up to assist victims of financial crime!

The first submission attempt

- 7 November 2018, in first submission to AFCA, VOFF provided 20 pages of evidence from the Office of the Australian Information Commissioner and from Treasury. VOFF raised concerns about widespread systemic issues, such as Regulatory Failure; Weaknesses in Legislation; Politicizing a Crime; Lies and Cover up; Conflict of Interest; Revolving Doors; Failure to serve public's best interest; Ignoring Crime; and Ignoring the Victims of Crime.

- 13 November 2018 AFCA's reply said,

We have contractual authority over the financial firms that are members of financial services external dispute resolution schemes, but Trio Capital has not been a member of any such scheme since its collapse. As a result, we have no authority to commence any action or investigate complaints against Trio Capital or its directors. In addition, the conduct of Trio Capital which gave rise to losses for many consumers would likely be outside the time limits for our jurisdiction even if it was a member of AFCA.

However, on a broader front than specific complaints that your members may have, the issues that you raise are important ones for the government, the regulatory and for the industry. As we have seen in the media, trust in financial services is at a low point.

AFCA didn't identify the important issues or did it mention if it had informed the Australian Securities and Investments Commission (ASIC) of systemic issues. According to AFCA's website, *under ASIC Regulatory Guide 267: AFCA is required to identify, refer and report systemic issues, serious contraventions and other reportable breaches.*

- 16 November 2018 VOFF complained about AFCA's uncertainty about a serious issue "would likely be outside the time limits for our jurisdiction" VOFF also asked how it could achieve justice and restitution?

- 16 November 2018 AFCA's reply said,

'... you have advised that VOFF is complaining about the service, or lack of, by both financial regulators ASIC and the Australian Prudential Regulations Authority (APRA). Unfortunately, AFCA is a public company, limited by guarantee, which is approved by ASIC to exercise contractual authority over our members - the financial firms. We do not have any authority over government regulators.

If you have any concerns about the activities of any government agency, such as ASIC or APRA, your best option would be to make a complaint to the Commonwealth Ombudsman, who has

jurisdiction over these types of issues. Ways in which the Commonwealth Ombudsman can be contacted are listed at: <http://www.ombudsman.gov.au/contact-us>

The above submission is an example of how our other submissions were received by AFCA. As VOFF Secretary, I perceived AFCA was not interested in systemic issues and it's as if it didn't want to receive complaints about ASIC's and APRA's handling of Trio.

- 17 January 2019 VOFF wrote to the Commonwealth Ombudsman and attached a 12-page outline of 3 key pieces of evidence; 6-pages outlining 10 regulatory failures; and 1-page detailing the failure to investigate white-collar crime.
- 5 February 2019 the CO's reply dug up VOFF's earlier correspondence and combined these into one gigantic complaint. VOFF regarded our latest letter as a standalone issue. We had compelling new evidence and didn't anticipate that the letter would be lumped with previous correspondence and made to look like a nuisance. The CO wrote,

The Ombudsman's Office does not have a role in influencing or directing how ASIC operates or what its regulatory priorities should be - this is the role of Parliament and ASIC's governance board. We do not have the power to force ASIC to do a particular thing, nor can we change or overturn any decision it may have made. For those reasons, we usually find that investigations into regulatory matters do not result in the outcome the person seeks.

The CO added,

I have now assessed your complaint on three separate occasions. If you think the way I assessed your complaint was flawed, you may request an internal review by a different officer. I have included a copy of the form for you to use. Please note, simply being unhappy with my decision is not sufficient grounds for a review. If you want to request a review, you must clearly identify why you consider my decision or handling was incorrect or unreasonable and provide supporting information or evidence.

Attempt to resolve dispute

VOFF wrote to ASIC² and Treasury to inform of ongoing loss and damages caused after the Trio fraud. A company licensed by ASIC and prudentially reviewed by APRA but was able to operate fraudulently. VOFF's 3-page letter to ASIC dated 5 February 2018, detailed some of the contributing factors [systemic issues] that led to Trio victims financial loss.

ASIC replied on 8 March 2018 but failed to answer VOFF's concerns.

VOFF wrote a ten-page letter to Treasurer, Josh Frydenberg,³ dated 24 October 2018, pointing out VOFF's concerns.

Mr Frydenberg never replied.

VOFF's letter to ASIC's Chairman, James Shipton dated 5 December 2018,⁴ offered an opportunity for ASIC to let the Guernsey authorities question Mr M [Trio overseas fund manager] Under Clause 11 of the Fraud (Bailiwick of Guernsey) Law, 2009. The law would allow the Guernsey authorities to question Mr M about how \$50m disappeared.

Mr Shipton did not reply.

² See copy of letter to ASIC <https://tinyurl.com/y77lvneg>

³ See letter to Josh Frydenberg <https://tinyurl.com/yd5924qw>

⁴ See letter to ASIC's Chairman James Shipton <https://tinyurl.com/y9c4cocz>

Introduction

Dr. William Haddon introduced to road safety a conceptualization of injury epidemiology and prevention. He developed "*the understanding and prevention of disease and injury should be the first strategy of medicine and that treatment, no matter how necessary, is not the logical first line of attack.*"⁵ Haddon saw motor vehicle 'crashes' in terms of physics, and the range of pre-crash, crash and post-crash interventions for reducing crash losses. Before the 1950s road deaths were attributed to 'human factors'. Later other factors were recognised such as mechanical, environmental, roadside fixtures and weather conditions.

The Trio financial fraud consists of pre-fraud, fraud in action and post-fraud. In each of these stages, it is apparent that ASIC failed consumers. ASIC didn't fulfil the role it claims to preform: "*to regulate company and financial services and enforce laws to protect Australian consumers, investors and creditors*".

Financial regulators with a history of being reluctant to act against misconduct; politicians and public servants who are not trained in forensic accounting, are not the preferred option to investigate a \$194.5m theft.⁶ Politicians and public servants have a history of being bias, they often have conflicts of interest, use revolving doors for job prospects, and are often captured by industry, etcetera.

The Trio victims placed their savings in an ASIC licensed fund that was prudentially reviewed by APRA, [APRA regulated]. They followed the law, followed superannuation rules, regulations and requirements. It took the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the Productivity Commission to find ASIC reluctant to act against misconduct. Former chairman of the Australian Competition and Consumer Commission (ACCC), Alan Fels saw the reluctance as a, "*severe dereliction of duties by both regulators*".⁷ No wonder Trio victims are let down.

According to financial commentator Alan Kohler, "*the terrible behaviour, greed and corruption exposed by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission) was the result of 'failures of policy and regulation'*".⁸

Dr Andy Schmulow, Senior Lecturer at the University of Wollongong, Karen Fairweather, Senior Lecturer, Auckland Law School, and John Tarrant, Professor of Law, University of Western Australia⁹ write, "*While acknowledging that other factors may have played a role in regulatory failures exposed in Australia's financial system over the past five years, we argue that there is, nonetheless, compelling evidence of capture.*"

⁵ <https://www.icorsi.org/dr-william-haddon-jr-1926-1985>

⁶ Financial System Inquiry: Submission by the Australian Securities and Investments Commission April 2014 page 192

⁷ Allan Fels, *Tough Customer Chasing a better deal for battlers* Melbourne University Press 2019 Page 101

⁸ Alan Kohler, *It's Your Money*, Published by Nero, Victoria, Australia 2019 page 6

⁹ Schmulow, A., K Fairweather & J Tarrant *Twin Peaks 2.0: Reforming Australia's Financial Regulatory Regime in Light of Failings Exposed by the Banking Royal Commission* Nov 2018 pages 4 and 5

'A series of scandals in the financial sector (ref)¹⁰ brought the question of ASIC's efficacy as a consumer financial protection and market conduct regulator into the spotlight in 2013. The immediate catalyst for the Senate Economics References Committee inquiry into ASIC's performance was a scandal involving serious misconduct at Commonwealth Financial Planning Ltd (CFPL), (ref)¹¹ and ASIC's failure to take timely and effective action, despite persistent whistle-blower reports made to it. In its report, released in June 2014, the Committee characterised ASIC as a 'timid, hesitant regulator, too ready and willing to accept uncritically the assurances of a large institution that there were no grounds for ASIC's concerns or intervention.' (ref)¹² It acknowledged too that 'the public perception that "the big end of town" is treated differently and less transparently to other regulated entities is inherently dangerous to ASIC's legitimacy as a regulator.' (ref)¹³ Ultimately, it considered that the credibility of the Commonwealth Bank and confidence in ASIC were so compromised that a Royal Commission was warranted.¹⁴

The Kenneth Hayne Commission found that ASIC was captured by industry, receiving gifts of champagne, vintage wines, expensive dinners, concert tickets, airline upgrades and customised 'training seminars' etcetera. News about former chairman, Mr James Shipton's personal "tax advice" and former ASIC deputy chairman Daniel Crennan's payments towards the rent on his luxury Sydney home, illustrates ASIC's self-interest as apposed to serving the public's best interest.

The systemic issues that VOFF provided AFCA are not recorded anywhere. The Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital, (PJC Report), established to investigate the Trio fraud, missed vital evidence about the Trio matter. The official Trio narrative by ASIC and Treasury's Review are influencing sources of information peppered with misinformation. AFCA is unable to assist Trio victims' genuine complaints.

Pre FRAUD

Late 1990s to 2004, the period before the international brokers purchased an Australian fund and renamed it Trio Capital. Trio became the Responsible Entity to several funds.

Systemic issue 1 - Weaknesses in legislation

Legislation reforms were introduced following the Trio Capital fraud, see 1st highlighted clip below. Some of that legislation occurred by stealth. The public were not informed

¹⁰ (ref) For a summary, see: Schmulow, Andrew. (April 2018). "Regulating the Regulator: Improving consumer protection under a Twin Peaks regulatory framework". The International Review of Financial Consumers, Volume 3 Issue 1. 1-13. Andrew Schmulow, K. Fairweather & John Tarrant, above n 7, 'IX A Regulator for the Regulators', (forthcoming) page unknown. Fn 3ff; Andrew Schmulow, 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2018) 12(1) Law and Financial Markets Review 1, 163-73, fn 103, 104; Adele Ferguson, 'Hearing into ASIC's failure to investigate CBA's Financial Wisdom', Sydney Morning Herald (online), 3 June 2014 <<http://www.smh.com.au/business/hearing-into-asics-failure-to-investigate-cbas-financial-wisdom-20140602-39ept.html>>; Banking Bad (Australian Broadcasting Corporation, 2014); Adele Ferguson, 'Sweating on every word—how ASIC massaged the banking message', Sydney Morning Herald (online), 21 April 2017 <<http://www.smh.com.au/business/banking-and-finance/sweating-on-every-word-how-asic-massaged-the-banking-message-20170421-gvp9qt.html>>; Pat McConnell, 'ASIC's Fashion Faux-Pas', The Conversation (online), 13 July 2015 <<https://theconversation.com/asics-fashion-faux-pas-44590>>; Andrew Schmulow, 'Time for Abbott Government and ASIC to get serious about Australian banksters', Independent Australia (online), 10 August 2015 <<https://independentaustralia.net/business/business-display/time-for-asic-and-other-regulators-to-get-serious-about-australian-banksters,8036>>.

¹¹ (ref) The financial planning arm of the Commonwealth Bank.

¹² (ref) Senate Economics References Committee, Parliament of Australia, Performance of the Australian Securities and Investments Commission (2014) xviii.

¹³ Senate Economics References Committee, Parliament of Australia, Performance of the Australian Securities and Investments Commission (2014) 278 [17.47].

¹⁴ (ref) Ibid, Recommendation 7.

about how the Trio 'fraud' exploited weaknesses to steal millions of dollars from the Australian financial system.

falls below community expectations. The Royal Commission is examining similar issues to those you have raised in your letter and the Government will consider its response after the Commission reports in February 2019.

I note that the current regulatory regime is significantly different from the regime that was in place at the time of the Trio Capital collapse, in part because of the lessons learned from the collapse. In addition, the Government remains committed to the comprehensive package of superannuation reforms it introduced into Parliament last year. As part of this Member Outcomes package, before a change of ownership of a

Note, above clip is from letter to VOFF from Treasury dated 6 November 2018.

The following clip below is part of a Treasury letter to Information Commissioner dated 8 May 2018, [Page 2] secured under FOI law. Note that [APRA recognised weaknesses, too volatile to be make public!

10. Disclosure of the document therefore would, or would be reasonably likely to, prejudice the effectiveness of a [REDACTED] method used by APRA, as a person with malicious intent could use the information to identify and exploit the weaknesses [REDACTED]. Although some of the identified gaps in the SIS Act may be evident through studying the legislation, the relevant document draws particular attention to and explains what APRA considers to be weaknesses [REDACTED]. This analysis by APRA provides an additional layer of information which could be misused by a person with malicious intent.

Systemic issue 2 – Exemption from AML/CTF legislation

VOFF submitted a Freedom of Information request to the Australian Transaction Reports and Analysis Centre (AUSTRAC), for a copy of AUSTRAC's "Exemption" to waiver an early Trio fund from AML/CTF legislation.¹⁵ VOFF already had a copy of the Exemption Form, (Section 248 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 that had been acquired by the Trio fund in 2007).¹⁶ VOFF did not know if the document it held was authentic.

Correspondence with AUSTRAC

• First attempt

May 29th 2013 VOFF FOI Number 45 requested from AUSTRAC a copy of the Exemption document.

¹⁵ 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).

¹⁶ 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.

May 30th 2013, AUSTRAC said, '*AUSTRAC does not grant waivers for international funds transfers for reporting entities.*'

July 15th 2017, AUSTRAC provided three documents, but no 'exemption' document.

• Second attempt

February 22, 2016 VOFF FOI Number 422 requested from AUSTRAC, Copy of Absolute Alpha's request for an exemption-waiver and copy of AUSTRAC's acknowledgement of the \$50 million transferred by Mr P. into one of Trio Capital's overseas hedge funds in 2009.

March 24, 2016, AUSTRAC refused the exemption document under Section 24A of the FOI Act, saying documents cannot be found or do not exist.

April 8, 2016 VOFF sent AUSTRAC a copy of the "Exemption" document.

June 1, 2016 AUSTRAC sent express post a 7-page document.

ASIC, APRA, Trio's liquidator or the PJC Report made no mention about the Exemption Document during the Trio investigations.

Systemic issue 3 – APRA influence Part 23 legislation

In 2003 APRA had 4 attendees at each of the following two meetings to help shape Part 23 legislation. Twelve people attended the first meeting [10.07.2003] called *Review of Part 23 of the Superannuation Industry (Supervision) Act 1993 - Industry Consultation*. Ten people attended the second meeting [21.07.2003] called *Review of Part 23 – Industry Roundtable Meeting*. There is no indication that the meetings had anyone representing the self-managed or direct investors.

Whatever was discussed at these important meetings was not made public. Self-managed trustees were never consulted about the decisions made that directly related to their financial security. APRA attended both meetings, knowing that it solely represented and protected APRA-supervised funds.

Prior Sept 2009, the market was not informed about Part 23 of the SIS Act. Investors starting a superannuation fund were not aware of the protection offered by Part 23. This was not a failing by financial advisors to inform clients. Some financial advisors said they were in the industry for decades and never heard about Part 23 of the SIS Act.

Systemic issue 4 – Part 23 of the SIS Act

Part 23 of the SIS Act offers protection against "fraud" for APRA supervised funds. A fraud in an APRA supervised fund is deemed possible because many people manage the fund. On the other hand, the same protection is deemed unnecessary for self-managed funds because trustees are unlikely to steal from themselves. Insurance doesn't cover a self-inflicted crime.

How could a 1993 Act anticipate a 1998 Act? The SIS Act of 1993 would never have anticipated an international fraud exploiting the gatekeeper's role of a Managed Investment Scheme (MIS) in 2009. The 1993 policy makers would not have predicted future developments over the next twenty years. They could not have predicted a unique sophisticated fraud, able to catch the financial regulators and the financial services industry off guard. Did Part 23 architects anticipate a large-scale fraud against the

Australian financial system? Did they design legislation to protect a select few and decided not to inform the marketplace of the impending danger?

In May 2012, APRA's deputy chairman Ross Jones informed the Senate Estimates Committee hearing saying, '*... the fraud did not occur in an APRA-regulated entity, but in an offshore hedge fund, beyond the reach of Australia's regulators... and APRA did not collect statistical returns from the fund*'.¹⁷

Systemic issue 5 – Selective legislation that was never disclosed

VOFF perceive an exclusiveness of Part 23 that knock down the competitors of the APRA-supervised funds. Part 23 of the SIS Act trumps criminal law, and 1,000 Trio victims saw no justice. Part 23 compensated 90 per cent of the Trio victims, and removed any need for a proper thorough investigation. Part 23 encouraged misinformation, the withholding of evidence, and a massive cover-up. Part 23 exacerbated the harm caused to the 10 per cent group.

Part 23 became a market-signal to deter superannuation newcomers from opening a SMSF account and to discourage APRA-supervised funds from changing over to SMSFs.

Systemic issue 6 – Undisclosed Part 23

Senator Nick Sherry, at the Sydney Hearing into the collapse of Trio Capital, said to APRA's Greg Brunner,

'I suggest that if you said you are not subject to part 23' no-one would have any idea what you were talking about!

Mr Brunner said, '*No, clearly an explanation would need to be made at that point*'. Further on Mr Brunner notes, '*it is an area where perhaps there is a lack of understanding of the different types of frameworks that exist. So you would expect a professional who was advising people to warn them of the change in arrangement between the two different sectors*'.

Mr Sherry said, '*... I ask you to take it on notice to take these issues up with both the ATO and with ASIC, because I have been at a lot of committee hearings over the last 20 years and this issue has come up time and time again, and time and time again we get—and I am not criticising you or APRA—literally hundreds of people who are not compensable in the event of theft and fraud in the SMSF sector*'.¹⁸

Senator Sherry said there, "*is absolutely no disclosure in any way, shape or form that an SMSF is not compensated in the event of theft and fraud from the sub-entity, the sub-investment entity. There is nothing there that relates to that*".

Mr Brunner said, "*I would not have thought so. The part 23 arrangements clearly relate to APRA and supervised entities. I think when people step outside the APRA framework, there would be an expectation of understanding from us that people would understand that.*"

Mr Sherry, said, "*very few, if any, SMSF trustees knew of the compensation provisions in this case—or, frankly, in previous cases where I have been a member of a committee conducting an inquiry: very few knew. Don't you think it would be appropriate that they be informed of that? At least as part of their consideration in setting up an SMSF, don't you think it is an*

¹⁷ Mike Taylor 'APRA seeks to create distance from Trio Capital blame' 31 May, 2012

<http://www.moneymanagement.com.au/news/financial-services/2012/apra-seeks-to-create-distance-from-trio-capital>

¹⁸ Parliamentary Joint Committee on Corporations and Financial Services - 04/04/2012 - Collapse of Trio Capital, Sydney

appropriate risk issue that they should be aware of?"

Systemic issue 7 – ASIC & APRA failed to communicate

The Parliament Joint Committee held concern about,

'... the length of time it took for ASIC to detect fraudulent activity in Trio. It is particularly concerned that communication between ASIC and APRA was lacking in the months from late 2008 to mid 2009. ASIC's Chairman has emphasised that given the goal of 'efficient markets' and rectifying asymmetries of information, it is important for investors to have clear disclosure of the assets in a portfolio.¹⁹ Yet, it seemed that APRA had not communicated to ASIC its requests for Trio to provide information. As a result, when ASIC commenced its active surveillance of hedge funds in June 2009, it did not seem aware that Trio was not providing the prudential regulator with basic facts about the existence of assets and their value. This information should have been communicated.'²⁰

The Committee also notes,

' ... both ASIC and APRA apportion significant blame for the collapse of Trio Capital on the gatekeepers, in particular the auditors. The second point is that, notwithstanding the role of these gatekeepers, there are lessons for both regulators including their communication with each other.'²¹

ASIC and APRA independently found irregularities in the way the Trio directors managed Trio Capital but failed to communicate with each other and took no action.

Systemic issue 8 – No background checks

In 2003 ASIC accepted Canadian, Shawn Richard's claim that he had a bachelor of finance degree and was "senior portfolio manager" when in reality he was better described in his Taiwan days as office boy.²²

Mr Richard deceived ASIC to get an Australian financial services licensee (AFSL). He was able to give false credentials, establish a deceptive business in Australia and handle Australian superannuation savings while on a tourist visa.

The Trio fraud seems an example of how fraudsters outsmarted law enforcement, the financial regulators and AUSTRAC as they did nothing to prevent money laundering or minimize the risk to Australians. Also they did nothing to help the creditors get their savings back.

Systemic issue 9 – ASIC oversight

In 2002, two years before Mr Flader and Mr Sutherland purchased the Australian fund that became Trio, ASIC had visited their office. It wasn't a casual visit by any means. It involved ASIC joining force with the Tax Office, the Australian Federal Police and the Commonwealth Director of Public Prosecutions to travel to Hong Kong to secure 100,000

¹⁹ Ref. Mr Greg Medcraft, Committee Hansard, 6 September 2011, p. 6.

²⁰ Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital May 2012 (PJC Report May 2012) page 84

²¹ PJC Report May 2012 page 69

²² Washington, Stuart 'Another black mark against ASIC' July 19, 2010 <http://www.watoday.com.au/business/another-black-mark-against-asic-20100718-10fzv.html>

documents in relation to a Queensland man Mr Hart who faced charges in Australia for a massive fraud against the Commonwealth.²³ ASIC wilfully shut its eyes to the seriousness of the event; wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make.

The scheme offered by Mr Flader and Mr Sutherland including the documents helped secure a conviction and send Mr Hart to prison. What type of scheme does that? Yet ASIC didn't check its own database where in 2001 Mr Flader and his business partner had registered a holding company with ASIC. In late 2003 the holding company purchased the fund that eventually became Trio in November 2004. ASIC wilfully and recklessly failed to notice that the same two men from HK were commencing an operation based in Australia.

In 2012, Mathias Cormann MP asked APRA's Chairman Ross Jones,

"Did the ATO ever communicate to APRA that Mr Flader had been involved in a fraudulent scheme that the ATO had discovered and successfully prosecuted to the extent that Mr Flader's Australian associate was jailed for seven years?"

Mr Jones answered "No" adding *"We checked our files, and we have no communication from the ATO on that."*²⁴

Systemic issue 10 – Wilfully blind to counterparts' warnings

ASIC's counterpart posted warnings on their websites:

- The Netherlands Authority for the Financial Markets (AFM);
- The Financial Supervision Commission of the Isle of Man (FSC);
- The Austrian Financial Market Authority (FMA);
- The Comisión Nacional del Mercado de Valores (CNMV) Spain;
- Financial Markets Authority (New Zealand) and
- Securities & Futures Commission of Hong Kong.

Around 2004, the above websites in Europe warned about the United States registered New World Financial (NWF) that had offices throughout Europe and was selling dud stock. Also selling dud stock was the unlicensed Philippines based firm Millennium Financial. Owners and operators of these funds included Matthew Littauer, Shawn Richard, Frank Richard Bell, Jack Flader and James Sutherland. Their names were already in ASIC's database on the Wright Global Investments Pty Limited ACN 097 478 487, registered with ASIC in 2001, and Mr Richard's registration form dated 12/07/2001. That's three years before they purchased and established the Trio Capital scheme.

Systemic issue 11 – Was evidence removed?

In 2001 and 2002, the New Zealand Securities Commission's website carried warnings about the unlicensed Millennium Financial Ltd operating out of the Philippines and listed 17 names. Shawn Richard [the man who became a director of Trio] was among those listed. This listing is two years before Trio was created.

²³ Commonwealth Director of Public Prosecutions v Hart [2010] QDC 457 (30 November 2010).

²⁴ Hansard, Senate Estimates, Canberra APRA 29th May 2012 Page 178)

In September 2009, after the Trio fraud was uncovered and reported by media, Mr Richard's name was removed from the NZ website. Sydney Morning Herald investigative journalist Stuart Washington said, the NZ Securities Commission could not provide a reason for its removal.²⁵

Systemic issue 12 – Missed opportunity

In early 2009 the Sydney Morning Herald contacted the custodian of the Trio Capital Limited scheme, the [...] Trustee, to enquire about the Astarra Strategic Funds' assets. The bank provided a statement confirming that the assets were indeed in the safe custody of the bank. The bank's statement quelled the Herald's concerns. The bank had passed on [deceptive] information that the Trio scheme had given the bank.²⁶ The mistake suggests the custodian was not fulfilling its role as an independent gatekeeper as required under legislation. By incorrectly confirming that assets were indeed in the safe custody of the bank, the Herald was inadvertently prevented from possibly discovering the fraud months before it was eventually uncovered and saving tens of millions from fraud.

On 6 October 2016 VOFF submitted a Freedom of Information (FOI) request to ASIC seeking information about the bank sending the journalist away. On 3 November 2016 ASIC said no document could be found or does not exist.

Systemic issue 13 – Undisclosed harmful legislation

Did the authors of Part 23 of the SIS Act have a responsibility and obligation to inform the public of the potentially harmful legislation? There is no evidence to show that the market was informed about Part 23 of the SIS Act. Failure to inform consumers, particularly people who are mandated into superannuation, makes it imperative for consumers to have access to justice or an insurance remedy such as a Compensation Scheme of Last Resort (CSLR) / Legacy Fund or EDR scheme.

Scott Morrison as Treasurer said,

"The banking industry royal commission hasn't uncovered bad behaviour that the government didn't know about."²⁷

So the government knew of prevalent money laundering, fees for no service, forgery and bribery, including health insurance for the dead, junk insurance, useless products and a litany of other types of malfeasance. Armed with this knowledge, an EDR scheme was established that's unable to tackle failed policy and regulation or systemic issues!

FRAUD in action

Period between November 2004 to September 2009. Trio's operating life lasted 5 years.

²⁵ [http://www.smh.com.au/business/how-investors-in-trio-backed-the-wrong-horse-with-\\$426-million-Stuart-Washington-March-27-2010](http://www.smh.com.au/business/how-investors-in-trio-backed-the-wrong-horse-with-$426-million-Stuart-Washington-March-27-2010)

²⁶ PJC Report 2012 *Op. cit.* page 34 ref. Mr John Hempton, 'A dark privatised social security story: Astarra, the missing money and how examining a fund manager owned by Joe Biden's family led to substantial regulatory action in Australia', Bronte Capital, 2 January 2010, <http://brontecapital.blogspot.com.au/search?q=trio> (accessed 17 April 2012).

²⁷ Aaron Patrick Australian Financial Review 4 April 2018

Systemic issue 14 – Auditing

Regarding ASIC's Enforceable Undertakings. Allan Fels's writes,

'...ASIC, have tended to overuse them when they should have taken court action, as we heard at the Banking Royal Commission.

*The problem with using enforceable undertakings instead of taking court action is that generally it's not what parliament intended for significant breaches of the law. Parliament has prohibited certain forms of behaviour and attached sanctions to them, and the regulator's job is to enforce the law. It's not appropriate to do a private deal with the company rather than go to court and get a court outcome. That approach is also not sufficiently transparent as to what deals get done behind closed door. For example, part of the deal may be for the regulator not to give a full public account of what the unlawful behaviour has been.'*²⁸

Concerning the Trio fraud, ASIC didn't provide an accurate account of how Trio's money disappeared or explain why no one followed the money trail. ASIC offered the Trio auditor an Enforceable Undertaking. EUs don't reveal or resolve systemic issues.

In 2010, investigative journalist Stewart Washington questioned the auditing of Trio, saying,

Trio Capital is the responsible entity and a responsible entity has legal obligations to employ a series of third-party gatekeepers, such as the auditor. WHK was a listed accounting business for Trio. KPMG was paid to perform another gatekeeping role... but it is unclear whether KPMG's audit asked questions of Trio.

Washington continues, Particularly when the scheme's financial position as at June 30th 2009 showed that \$47 million was transferred between Trio funds, with an overseas fund expanding to \$75 million. KPMG's should have asked:

Where did the \$47 million come from?

Who moved it?

Why the rush on June 30th?

Why were these transactions going unreported in annual reports?

*The June 30th movement of \$47 million into one of Trio's offshore fund, affecting several other Trio funds, was not something that was noted in particular. KPMG signed off on all the affected funds' compliance plans.'*²⁹

No one to-date has ever answered Mr Washington's questions.

In 2017, when Mr Medcraft retired from ASIC, he warned in an interview on ABC Radio³⁰ that Australia could have an Enron-style corporate collapse if the accounting firms Deloitte, KPMG, PWC and Ernst and Young don't improve their auditing standards.

Systemic issue 15 – Money laundering & AML/CTF law

Attorney-General Mr Porter in the Australian Financial Review said,

'...Westpac's fine ... should serve as a 'wake-up call to every other financial institution' that the government expected strict obedience with anti—money laundering (AML) laws to protect

²⁸ Allan Fels 'Tough Customer, Chasing a better deal for battlers' Melbourne University Press 2019 Page 112

²⁹ Stuart Washington Trio problems are a failure on the part of its gatekeepers Jan 2 2010
<http://www.smh.com.au/business/trio-problems-are-a-failure-on-the-part-of-its-gatekeepers-20100101-llqf.html>

³⁰ Peter Ryan on AM - Poor auditing risks Enron-style collapses: ASIC boss 03.11.2017
<http://www.abc.net.au/radio/programs/am/poor-auditing-risks-enron-style-collapses-asic-boss/9114592>
<http://www.abc.net.au/news/2017-11-03/asic-boss-concerned-over-poor-auditing/9114490>

Australians from criminal activity.' (25.09.2020)

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) is 14-years old. Hearing the first 'wake-up call' in 2020 begs the question, what's been happening over the last 14 years?

The Trio fraud happened in that 14-year period. Trio's custodians were on duty when \$194.5m disappeared. How was it possible for Trio to transfer through a bank, a single transfer of \$50 million, to a foreign tax haven without raising a suspicious transaction report?

During the Trio investigation (2010 to 2012), ASIC, APRA and AUSTRAC didn't ask about the \$50m transfer. Trio's custodians were not asked about their obligations under AML/CTF Act. The Trio victims and public have no knowledge of whether the custodians met their obligations and responsibilities under anti-money laundering laws.

In May 2012, the PJC Report said,

*'The custodian in Trio's case, (...) 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'*³¹ Also, *'... the custodian does not have the expertise to question underlying values of either domestic or offshore funds.'*³²

The PJC added,

*'The committee did not receive a submission, or take direct evidence from the Australian Reports and Analysis Centre (AUSTRAC). It does appear, however, that AUSTRAC was not given any significant information from the various gatekeepers alerting it to suspicious activity in Trio Capital. In this context, questions must be raised as to whether the gatekeepers— particularly the financial advisers and custodians—conducted due diligence when taking on prospective clients.'*³³

Trio victims had no benefit from AML/CTF protection. Money laundering through the ATM's at the Commonwealth Bank because drug syndicates and outlaw motorcycle gangs were under surveillance. Westpac's money laundering was discovered because people supporting human trafficking and Pedophilia were under investigation.

The Trio fraud was uncovered because of John Hempton's curiosity. As CIO of Bronte Capital, he relayed his concerns on to ASIC.

When the Banking Royal Commission released its Interim Report on 12 October 2018, The Chief Executive Officer at ANZ, invited disgruntled bank customers to email him directly.³⁴ On 16 October 2018, VOFF's email asked whether Trio's custodian was exempt from AML-CTF law when \$194.5m went overseas?

Mr E wrote,

³¹ PJC Report May 2012 Page 123

³² Ibid.

³³ PJC Report May 2012 Page 145

³⁴ Peter Ryan ANZ boss Shayne Elliott urges disgruntled customers to email him directly 12 Oct 2018 <http://www.abc.net.au/news/2018-10-12/anz-boss-shayne-elliott-fronts-parliament/10368460>

"I refer to the letter by email dated 16 October 2018. ANZ is "not exempt from AML-CTF" laws and is required to, and does, meet its reporting obligations to AUSTRAC including the obligation to report all cross-border funds transfers."

The PJC Report infers that responsibility for money transactions rests with the responsible entity - not the Custodian. Mr Richard was Trio's responsible entity. He was jailed for his part in operating Trio. The PJC Report claims,

"The custodian does virtually nothing 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".³⁵

From the post Hayne Banking Royal Commission perspective, it looks like the Trio custodians escaped a proper investigation. No one appears to have checked whether the custodians breached their obligations under anti-money laundering laws and the government was quick to point blame at DIY superannuation account holders.

Systemic issue 16 - Conflict of interest

VOFF learnt in October 2017 that the Australian Workers Union (AWU) had a 'slush fund' called 'Officer's re-election fund' (OEF). OEF invested in Trio and lost money to the fraud. The OEF money was the union's war chest. Mr Shorten's office issued a directive to ASIC, to 'bring down' the financial adviser who had recommended the Trio product to the AWU. Other examples of Mr Shorten's union bias are:

- i) The AWU National Secretary kept quiet about the Australian Workers' Union slush Fund;³⁶
- ii) AWU - Cleanevent deal that cost 5000-odd workers as much as \$400 million;³⁷ and
- iii) Attempt to destroy the small business trucking industry by forcing the little guys to join the trucking giants.³⁸

VOFF investigated whether Mr Shorten disclosed his conflict of interest concerning the AWU while in charge of the Trio investigation but VOFF found no disclosure.

Systemic issue 17 - Union bias

Senator Mathias Cormann echoes a similar concern when he stated,

'Bill Shorten's problem is that he continues to let his union bias get in the way of his responsibility as a Minister to act in the public interest. 'It's the forgotten families of Australia who are being asked to pay the price for Bill Shorten's shameless union bias'.³⁹

³⁵ PJC Report May 2012 Page 132

³⁶ <http://tinyurl.com/y7d3jxlg>

³⁷ Anthony Klan 'Cleanevent staff lost \$400m under deal by Bill Shorten's AWU' July 8, 2015
<http://tinyurl.com/hwqmqa>

³⁸ Grace Collier Union, Gillard rules driving owner-truckers out of business March 5, 2016
<http://tinyurl.com/l9nsuxw>

³⁹ Shorten to blame for workers' super losses 09/06/11

<http://www.liberal.org.au/Latest-News/2011/06/09/Shorten-to-blame-for-workers-super-losses.aspx>

Ben Davies, Chief of Staff from the Hon Michaelia Cash's office, wrote to VOFF on 6 September 2017 saying,

"the actions of Mr Shorten when he was the Minister responsible for Superannuation consistently fell short of the standards of unbiased conduct that Australians are entitled to expect."

The misleading comments about Trio by Mr Shorten and Mr Medcraft denied Australians an opportunity to understand or learn from the Trio fraud.

Post FRAUD

Period from September 2009, to the date of writing this submission, March 2021.

Systemic issue 18 - Red herring.

ASIC's misinformation appears to have trickled down. For example, correspondence to the Australian Federal Police (AFP), dated June 21st 2012, obtained under the Freedom of Information, ASIC write,

*'Trio was a funds management group based in Albury, NSW and provided a complex suite of managed investment funds which were heavily marketed through several financial advisors in Australia. These financial planners earned fees and commissions based on investments into Trio funds...It is alleged that financial advisers provided recommendations to clients due to high commissions which were paid by Trio. It is further alleged that the complex structure of the Trio scheme was designed to conceal fraudulent activity.'*⁴⁰

ASIC place weight on what several financial advisors allegedly earned from recommending Trio to their clients. How or why ASIC selected several financial advisors from the 155 advisers, planners and fund managers who also advised / placed their clients into Trio products is not known. ASIC's letter ignored the crime.

In the same FOI release of documents, the AFP had remarked about ASIC's letter, saying, *'the material provided by ASIC does not provide sufficient information to support an investigation into any Criminal Code Act 1995 offences...'*

For whatever reason, ASIC had provided an erroneous claim to the AFP. No one was ever charged for receiving high commissions. The trickle down misinformation can be found in Treasury's review of the Trio fraud. Treasury writes,

*'Notwithstanding the conduct of some financial planners in Australia who appear to have been influenced by high commissions in recommending their clients into Trio Capital products, the fraud largely took place in off shore hedge funds.'*⁴¹

The PJC Report repeats the same misinformation, noting that financial advisors were paid hefty commissions by recommending Trio to their clients.⁴²

⁴⁰ VOFF FOI No 373 to the AFP July 28 2015 17 pages and 2 pages

⁴¹ The 'Review of the Trio Capital Fraud and Assessment of the Regulatory Framework' by Treasury 26th April 2013 P. 5.

⁴² PJC Report May 2012 page 153

The official versions of the Trio fraud miss an enormous amount of details about the owners that operated the Trio scheme. The victims feel their best interests were not served. They perceive ASIC threw the AFP a red herring.

Systemic issue 19 – Evidence not disclosed

The Hong Kong based company Global Consultants and Services Limited (GCSL), owned and operated by American lawyer Mr Jack Flader, was apparently where all the money out of Australia destined for diversified international investments went through GCSL. In 2010, GCSL handed documents to the Hong Kong Securities & Futures Commission and ASIC received the documents under the Memorandum of Understanding (MoU). The documents remained exempt under the MoU and no one has learnt anything about their content or whether GCSL breached any laws.

The PJC Report made no mention about the GCSL documents. The Liquidator, PPB Advisory, had to take ASIC to court to gain access to the GCSL documents and even then, ASIC only provided part of the tranche. The level of protection ASIC afforded GCSL has left the consumers, who were robbed of their savings, in a void and worse off. A proper forensic investigation would have wanted to examine the company where the money flow started. That would have been the obvious starting point in a proper 'follow the money trail' investigation. ASIC's withholding of information adversely affected the Trio victims.

Systemic issue 20 – Failure to provide evidence

Mr Carl Meerveld was a fund manager of one of Trio's overseas underlying funds. Before moving to Guernsey he lived in Hong Kong, where his work colleague American lawyer, Mr Flader resided. By 2010, Mr Meerveld had become a resident of Guernsey. It was while he was living in Guernsey that he offered to assist ASIC in the Trio fraud investigation. [Letter to Guernsey Financial Services Commission dated 14 April 2016 and letter from Guernsey Financial Services Commission dated 20 April 2016] ASIC declined Mr Meerveld's offer.

At the 2011 trial of Trio manager Shawn Richard, the NSW Supreme Court (NSWSC) said, Mr Richard had assisted ASIC by providing information that saved ASIC from,

'significant time and resources seeking to gather independent admissible evidence, including evidence from uncooperative witnesses from numerous overseas jurisdictions'.⁴³

ASIC failed to inform the NSWSC that two cooperative witnesses from overseas jurisdictions did offer assistance. As well as Mr Meerveld's offer, Mr Flader, in March 2010, provided the Sydney Morning Herald with information about Trio to set the public records straight. The NSWSC possibly overvalued the significance of Mr Richard's assistance to ASIC, because the court rewarded Mr Richard's pleas of guilty, with a discount of 25% off his sentence with an additional 12.5% discount allowed for the utilitarian value of the pleas of guilty.⁴⁴ After all Mr Richard's guilty plea was for being dishonest, the fact that \$194.5m disappeared without any trace didn't seem to matter.

⁴³ Regina v Shawn Darrell Richard [2011] NSWSC 866 (12 August 2011) before Garling J.

⁴⁴ Ibid.

In February 2019, VOFF lodged a complaint to the Commonwealth Ombudsman about ASIC withholding information from the NSWSC. The Ombudsman said it has no role in this space.

Systemic issue 21 - Misinformation

The Trio victims were misled by misinformation. On 1 April 2016, the Minister for Small Business and Assistant Treasurer Ms Kelly O'Dwyer released Treasury's media statement that stated,

"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."⁴⁵

The Government didn't mention the 8-page aide memoire document circulated within government, dated 10 December 2015 that was damning of ASIC.⁴⁶ That's 4 months before Ms O'Dwyer released the 1 April 2016 statement!

The government also failed to mention that in May 2016, (4 weeks after the release of Treasury's statement) the Financial Sector Advisory Council (FSAC), presented the Government with advice on the performance of the regulators - ASIC, APRA and the Reserve Bank - and on policies relating to the financial system, including potential areas for regulatory reforms.

At the point when Treasury released its 1 April 2016 statement the government closed the Trio matter. Its decision to close this landmark matter was based on misinformation.

Systemic issue 22 – Trio was politicised

The government's own history of scandals, such as the corruption around Eddie Obeid; ICAC found Australian Water Holdings "tantamount to fraud" and Mr Sinodinos stood to receive a \$20 million bonus that he claimed he wasn't aware of; Backstabbing; Parliamentary eligibility crisis; Choppergate; Robodebt; Sports Rorts affair; NSW Premier's office shredded documents used to sign off on a pork-barrelling scheme; Federal government paid out nearly \$30m for land worth \$3m; and complaints of alleged rape. The government is in better shape responding to its own damage control to offset or minimize damage to reputation, credibility, or public image compared to what it does when there's a public crisis.

Concerning the complaints of alleged rape, Party leader of the Australian Labor Party, Anthony Albanese said on national television, [20 February 2021] "The reported sexual assault [against Brittany Higgins] was seen as a political problem as opposed to a crime against Ms Higgins ..."

'Nationals MP Barnaby Joyce also backed an independent inquiry but only to stop what he said was a trial by media.'

⁴⁵ Government decision on financial assistance relating to the collapse of Trio Capital <http://kmo.ministers.treasury.gov.au/media-release/032-2016/>

⁴⁶ Adele Ferguson Banking Bad, Published by Harper Collins Australia 2019 Page 183

He said it should be conducted by a retired judge and be held in camera so as to ascertain the facts and whether further action was warranted, while stopping the issue being weaponised by politicians and the media'.⁴⁷

Why was the Trio matter weaponised by politicians? ASIC public interest test relies on the numbers when deciding whether an investigation is necessary or not. 1,000 Trio victims didn't warrant an investigation. Imagine if the same logic was used for a rape matter?

Systemic issue 23 – ASIC powers

ASIC 'has the power to commence public interest proceedings in the name of private plaintiffs (such as creditors, shareholders or the corporation) where such plaintiffs have suffered loss or damage and are left without sufficient resources to maintain expensive and complicated litigation.'⁴⁸

'In practice however, ASIC nearly always refers major prosecutions to the Commonwealth Director of Public Prosecutions (DPP).'⁴⁹

ASIC declined to help Trio victims claw back the proceeds of crime. The Trio victims found nothing resembling a *fair, affordable and appropriate resolution processes to resolve disputes with financial service providers.*

Systemic issue 24 – Minister wasted VOFF's time

During the Trio investigation Mr Shorten informed VOFF that his office was looking into what could be done for the uncompensated investors. He asked VOFF to reframe from campaigning because he didn't want it to appear that a lobby group pressured the minister to make a decision. VOFF laid low for nearly two years in which time the minister continued to use disingenuous and misleading comments about the Trio victims.

More time was wasted by ASIC's many years of its ongoing investigation that proved useless in the end. Now it's AFCA's turn, *'as an alternative to tribunals and courts to resolve complaints consumers and small businesses have with their financial firms'* offers false hope of an EDR scheme / a compensation scheme of last resort or a legacy fund to provide remedy. Ploys that waste time and keep the Trio matter away from the courts.

In hindsight, VOFF see how time was wasted by both sides of government giving false hope of remedy for people affected by misconduct in the financial sector. COVID-19 became an excuse to shelve the banking royal commission's recommendations.

Systemic issue 25 – Government is failing consumers.

Mr Scott Morrison made his position clear about bank victims at the Australian British Chamber of Commerce saying,

the victims are "complicit" for being too "passive" "Too often we, the customers, have also become complicit in allowing the deck to be stacked against us", "You can guarantee it—the more passive a customer is, the worse deal they are going to get."⁵⁰

⁴⁷ Phillip Coorey Accused minister to out himself, and protest his innocence 02.03.2021

<https://www.afr.com/politics/federal/accused-minister-to-out-himself-and-protest-his-innocence-20210302-p576xt>

⁴⁸ Jane Petrolo Barrister, ASIC's Power to Investigate After the Commencement of Proceedings, July 2007 Page 4.

<http://www.janepetrolo.com/wp-content/uploads/2011/07/ASICs-Power-to-Investigate-CPD.pdf>

⁴⁹ Jane Petrolo. Op. cit Page 5.

⁵⁰ Citizens Electoral Council of Australia Media Release Thursday, 30 August 2018 and

Malcolm Farr 'More choice, more competition, more power': Treasurer Scott Morrison on banking shake-up 3.08.2018

Mr Shorten, made his position clear when he said in regards to the Trio victims,

*"I believe in caveat emptor; Latin for "let the buyer beware" meaning you need to take responsibility for your own decisions, if you buy something without doing your homework, well, you're an adult, that's your responsibility."*⁵¹

Such unhelpful comments, intended to victimize victims of crime made the Trio victims feel it was their own poor investment choice that led to their loss. Adele Ferguson writing in Banking Bad explains how the Fairfax investigation into the misconduct in banking took off after the ABC television 4-Corners programme about the financial planning arm of the Commonwealth Bank went to air. Adele's phone didn't stop ringing. She received hundreds of emails from people around Australia. People informed Adele that the same thing had happened to them. They told her how originally they had thought it was a one-off problem. They were made to feel it was their own fault. When they watched 4-Corners, they realised they were not alone.

Trio victims experienced a similar self-blame. ASIC and Mr Shorten had claimed the Trio fraud was about poor-choice. But now VOFF is armed against the ruthlessness of politics and ASIC. Prof Brenda Marshall debunks Mr Shorten's propaganda by writing,

... there is nothing in the principles cited, or in any other authority which has been brought to our attention, to suggest that a person who has been misled when entering into a contract, by false representations of a type which were likely to produce that result and in fact did so, can be deprived of his remedy because of his failure to check the accuracy of those representations. (Ref)⁵²

Systemic issue 26 - Online blame-game

The worldwide social movement [#MeToo] against sexual abuse and sexual harassment, no longer accept the name blaming of a rape victim or to put into question the style of clothing the victim was wearing. In regards to Trio, online Trolls were in force. It's dumb to suggest fraud victims were robbed because they were greedily expecting to make money from investing. Police need to be able to identify Trolls because they might be industry wanting to keep bad behaviour, or politicians ranting misinformation.

Systemic issue 27 – Parroting misinformation

Stephen Jones, MP, Federal Member for Whitlam, and Senator Deborah O'Neill, Member of the Australian Parliament for Robertson made disingenuous, inaccurate and misleading comments about the Trio victims. Such as,

*'The reason these people lost their money is because they followed some very poor financial advice'*⁵³ and

*'What sort of financial advisor in their right mind would encourage someone to put their entire life savings into a single asset?'*⁵⁴

<https://www.news.com.au/finance/business/banking/more-choice-more-competition-more-power-treasurer-scott-morrison-on-banking-shakeup/news-story/9caafdca9aa92df50c15ffd8490ba770>

⁵¹ The Assistant Treasurer Bill Shorten's article "Clean-up time for financial advisers" (Telegraph 6 May '11 p34)

⁵² (1987) ATPR at 48,607, per Forster, Woodward and Wilcox JJ.

⁵³ Thompson, Angela Illawarra Mercury Trio anger spills over as victims protest 16th February 2013

Senator O'Neill, attributing blame to financial advice, asked ASIC at the Estimates Hearing, in Canberra (February 25th 2015),

"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?"⁵⁵

Mr Jones, currently Shadow Assistant Treasurer and the Shadow Minister for Financial Services and Senator O'Neill who Chaired the Standing Committee of Privileges failed to acknowledge what the PJC Report's found,

'the fraud specifically and principally targeted superannuation savings, and appears to be designed to take advantage of vulnerabilities in the superannuation system.'⁵⁶

Jones, O'Neill, and Shorten failed to acknowledge that when the Committee looked at the responsible entity and the gatekeepers, it found,

'the system can falter when the responsible entity stalls and deceives. In these circumstances, as the Trio case amply demonstrates, there are various points of systemic weakness relating to the role of the regulators, the auditors, custodians, research houses and financial advisors.'⁵⁷

ASIC's Chairman Greg Medcraft told the committee,

'there are checks and balances that we felt were built into the managed investment scheme (MIS) system that are just not working the way perhaps it was contemplated originally'. Also ASIC offered pointed criticism of the role of the auditors in the Trio case, but noted that this was due to systemic failure.'⁵⁸

Systemic issue 28 – Nonsense comment

Jeremy Cooper, a former deputy chair of ASIC⁵⁹ in referring to the self-managed investors caught up in the Trio fraud, claims,

"you can't have your cake and eat it too" and "you win your own wins, and you own your own losses."

Mr Cooper is the Chairman of Challenger Limited (Challenger) managing over \$57.4 billion in assets as at March 31st 2016.⁶⁰ As the former deputy chair of ASIC he would have recognized that prior September 2009 there were no warnings informing that superannuation savings can disappear due to weaknesses in legislation.

Mr Cooper neglected to mention that the SMSF sector did invest through ASIC and APRA

⁵⁴ Ibid.

⁵⁵ Proof Committee Hansard Senate Economics Legislation Committee Estimates 25 February 2015 Canberra page 98

⁵⁶ PJC Report May 2012 page 146

⁵⁷ PJC Report May 2012 page 154

⁵⁸ PJC Report May 2012 page 129 and (Ref) Mr Greg Medcraft, Chair, ASIC, Committee Hansard, 6 September 2011, p. 7.

⁵⁹ Schmidt, Lucinda Profile - Jeremy Cooper November 11, 2009

<http://www.smh.com.au/news/business/money/superannuation/profile--jeremy-cooper/2009/11/10/1257615026855.html>

⁶⁰ <http://www.challenger.com.au/about/index.htm>

with ANZ and NAB banks as custodians, audited by KPMG and WHK with good ratings by star rating firms and research houses. Mr Cooper did not support his nonsense cake comment with any forensic evidence. Mr Cooper fails to mention that Lord Denning said,

*'Fraud unravels everything'*⁶¹ and also noted by another court, *'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'*⁶²

Systemic issue 29 – Unjustified blame

Mr Shorten said that APRA-supervised "victims who are victims through no fault of their own" ... but the self-managed investors ventured "directly into troubled funds".⁶³

A Minister of the Crown made a distinction without a difference. Investigative journalist Stewart Washington asked whether DIY super investors, who account for a third of the \$1.3 trillion in Australian superannuation savings were aware of their lack of a safety net, Mr Shorten said: "I would say they are going to become a lot more aware."⁶⁴

Mr Shorten, through the media, often discriminated against SMSFs by wrongly suggesting that they were swimming outside the flags and he also often reminded DIY investors, 'Let the buyer Beware'.

VOFF believe it's inappropriate to remind fraud victims of "Caveat Emptor", as the term has no application where contract is induced by fraud.

Prof Brenda Marshall, Bond University, Faculty of Law writes,

'In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor - meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection'. (Ref)⁶⁵

That a Minister for Financial Services and Superannuation engage in victimization of victims of a crime is inappropriate and unacceptable. His remarks appear to have served politicizing ends.

Systemic issue 30 – Victim's own fault

Some of the Trio victims were made to appear that the 'fraud' and the loss of their savings was their own fault. The 'fraud' would have required collaboration between the foot

⁶¹ LAZARUS ESTATES LTD -V- BEASLEY; CA 1956 Denning LJ, Lord Parker LJ.

⁶² [Jonesco v Beard [1930] AC 298 at 301-302]."

⁶³ 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>

⁶⁴ Stuart Washington 'Largest government payout of \$55m for Trio super fraud' April 13 2011 <http://www.theage.com.au/business/largest-government-payout-of-55m-for-trio-super-fraud-20110412-1dcm5.html?skin=text-only>

⁶⁵ Marshall, Brenda (1995) "Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility," Bond Law Review: Vol. 7: Iss. 2, Article 3. Available at: <http://epublications.bond.edu.au/blr/vol7/iss2/3> (Ref) Murphy L, Senate Parliamentary Debates, (1974) Vol. 60, 540-541.

soldier on Australian soil with his overseas work colleagues. But there is no information to suggest that ASIC carried out a proper thorough investigation into any collaboration across various jurisdictions.

6,092 Australians were struck by the same identical crime. The politicisation of the crime, divided the victims affected by the same 'fraud' into different groups. Victims of the same crime were discriminated against, dividing them by the type of superannuation account they had. One group was made to appear that they followed the law; the other group was made to appear they were outside the law by '*swimming outside the flags*.'

Prof Brenda Marshall writes,

'... the 'reasonable person' provides the benchmark for assessing conduct under section 52, the overwhelming weight of authority is in favour of a less stringent test.⁶⁶ In judging the capacity of conduct to mislead or deceive, the approach is to assess the effect of the conduct on all who come within the relevant section of the public (that is, the group potentially exposed to the conduct), 'including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated.'⁶⁷

Systemic issue 31 – Misdirecting blame

AFCA state,

'We consider complaints about financial products and services. AFCA's service is offered as an alternative to tribunals and courts to resolve complaints consumers and small businesses have with their financial firms.'⁶⁸

Some of the VOFF members would like to complain about the way ASIC made a scapegoat of the financial adviser who had recommended Trio products to the Australian Workers Union. The Office of the Minister of Superannuation at the time gave a directive to ASIC to 'bring down' that particular financial adviser. In 2013 ASIC took the financial adviser to court on 14 concerns. ASIC alleged he received \$1m in illegal secret commissions. The figure was eventually worked out to be \$3,360 in (unintentional) undisclosed payments that were legal at the time. The mud from the \$1m allegation remains. ASIC and Mr Shorten turned community against community by turning an international high level fraud into an issue about poor advice. ASIC's 14 concerns were reduced to 4 of which ASIC relied on the Canadian Shawn Richard (Trio director) to give evidence in 3. Still serving prison time as Mr Richard was found guilty of dishonesty in 2011 by the NSW Supreme Court, he attended court as ASIC's star witness wearing prison greens.

Mr Richard's word was accepted above 5 witnesses consisting of respectable Australian citizens, some who had university degrees and skills in the financial services industry including the evidence offered by the financial adviser. ASIC placed greater weight on Mr

⁶⁶ Heydon J, 'The Relevance of the Victim's Level of Care in Misleading and Deceptive Conduct Actions' (1995) 2 CCLJ 230, at 230-235.

⁶⁷ Marshall, Brenda (1995) "Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility," Bond Law Review: Vol. 7: Iss. 2, Article 3. Available at: <http://epublications.bond.edu.au/blr/vol7/iss2/3> (Ref) Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) ATPR 40-303 at 43,752, per Deane and Fitzgerald JJ.

⁶⁸ <https://www.afca.org.au/about-afca>

Richard's word. An investigation into 'fraud' throughout the developed countries found no example that reflects the same comedy of errors as the ASIC case.

ASIC's Acting Chair Karen Chester, at the Australian Financial Review Summit 2020 said, '...our model litigate obligations means ASIC cannot run speculative litigation. We must of formed a reasonable basis for commencing any action as well as for appealing any decision...'

Would a model litigate start with 14 concerns, whittled to 4 and rely on the perpetrator of the \$194.5m fraud, who was jailed for dishonesty, to be star witness in 3 and encouraged to give evidence against a highly qualified financial advisor?

Mr Richard's lies started in 2004 to established Trio. His lies continued throughout the operating life of Trio. His lies obtain an operational license that allowed Trio to handle superannuation money. His lies deceived the entire financial sector.

It was investigative journalists from, The Sydney Morning Herald and The Australia Financial Review that made information about the people behind Trio public. ASIC didn't provide information, on the contrary, ASIC worked the absent of information to turn the crime into a financial advice issue. By politicizing the crime, public attention was distracted away from the fact that the Trio victims were robbed despite being in an APRA registered fund, licensed by ASIC. Corrupt politicizing of a crime can't be redressed by AFCA as it is unable to consider complaints about financial regulators.

Systemic issue 32 – Stolen money / stolen lives

Two people committed suicide after they discovered their life savings were stolen by the Trio fraud. Their deaths were not reported or recorded in connection with Trio. FOIs requests to ASIC and APRA for documents relating to the two suicide deaths received replies that informed no such documents exist. ASIC had and has no obligation to inform the perpetrator about what his deception and theft had caused honest hard-working folk when they learn their life savings have been stolen. Had official comments been accurate from the start; had there been justice; perhaps they may still be alive today.

Systemic issue 33 – Safer away from ASIC & APRA

The 65 investors who trusted Melissa Caddick saw both Ms Caddick and their savings vanish. On 8 March 2021, a news report said the court appointed liquidator has uncovered a considerable amount of money that will be returned to the creditors. The creditors will also be in line for another payment when Ms Caddick's home is put on the market.

Despite the embezzlement of money, despite that Ms Caddick operated without a license, despite investments were not in ASIC licensed or APRA regulated funds, yet the creditors are going to get back something! Trio creditors followed the highest government standards haven't got back a single cent.

Systemic issue 34 – Mr Flader faced charges in UK

In early 2016, Mr Flader and Mr Sutherland faced the charge laid by the Serious Fraud Office (SFO) of 'entering into or becoming concerned in a money-laundering arrangement,

that had targeted more than 1,000 investors in the United Kingdom. After a nine-week trial, the Southwark Crown Court jury acquitted Sutherland and Flader of laundering the proceeds contrary to Section 328 of the Proceeds of Crime Act 2002'.⁶⁹

During the hearing, the court learned that,

'over seven years of investigation, fraud police had uncovered a network of offshore companies and bank accounts across Europe and the world, through which "multiple unnecessary movements of money" were used to launder the fraud's proceeds, make them clean and untraceable and then distribute them back to those involved in the fraud. The entire edifice of companies and accounts was set up to deceive.

*The two accused money launderers were directors and managers of that process, bank signatories and in some cases even the beneficial owners of the companies involved.'*⁷⁰

Systemic issue 35 - November 2020 new information

In January 2019, The Australian Financial Review's Chanticleer said David Millhouse, a former director of Astarra, [later became Trio] was awarded a Phd by the faculty of law at Bond University for his thesis on the systemic and cultural failures in Australian financial services.⁷¹ Two months later in March 2019, Mr Millhouse was interviewed by Adam Creighton and Aleks Vickovich on 'Your Money with Ticky Fullerton'.⁷² The interviews and Mr Millhouse's writing demonstrate an enormous body of research and understanding of the Australian financial system. His 2019 publication, *Corporate Governance in Non-Bank Financial Entities*⁷³ looks at regulatory and product failures specific to the Australian financial system.

In contrast, Mr Millhouse, a Trio was a director, [November 2003 to October 2005] quite his job in early 2005 in disgust with some behaviour within Trio management. He wrote a 5-page complaint letter to the Wright Global Asset Management (WGAM) directors and delivered a copy to APRA. Mr Millhouse was aware that APRA had the Trio fund under 'Active Supervision' and he was satisfied that APRA would deal with the problems.

It wasn't until the PJC Report was released in May 2012 that he found out that APRA hadn't followed up his concerns. In 2013, Mr Millhouse entered into an Enforceable Undertaking with APRA, agreeing not to act as a trustee or as a responsible officer of a body corporate that is a trustee, investment manager or custodian of an APRA-regulated superannuation entity for a period of 10 years. Cornered into an unescapable situation by the EUs he and other directors had to follow cop the blame for another person's crime. ASIC and APRA can now use David Millhouse's book, supported by the faculty of law at Bond University and published in 2019, as a handbook and operating manual.

Systemic issue 36 - Remedy

Kenneth Hayne's Royal Commission Recommendation 7.1 proposed that the Compensation Scheme of Last Resort (CSLS) should have the ability to stand in the shoes

⁶⁹ <https://beta.sfo.gov.uk/cases/james-sutherland-jack-flader/>

⁷⁰ Nick Miller Busting the boiler room March 28, 2016 <http://www.smh.com.au/business/markets/busting-the-boiler-room-20160323-gnpuxj.html>

⁷¹ David Millhouse, The Australian Financial Review Chanticleer article, 'Hayne's legal reform challenge', 16 January 2019

⁷² David Millhouse on Your Money with Ticky Fullerton <https://www.youtube.com/watch?v=xlSnqERYa6Q>

⁷³ David Millhouse *Corporate Governance in Non-Bank Financial Entities*, LexisNexis Butterwoths 2019

of a consumer. The Commission's Final Report and the External Dispute Resolution Review Supplementary Final Report, [FSRC FR pp 482-487], suggest that consumers with complaints about firm(s) that are no longer operating need to have access to redress. The Ramsay Review also supports a CSLR / Legacy Fund.

AFCA was given extra power so it could consider complaints dating back to 1 February 2008 and according to its website, AFCA is a strong supporter of a compensation scheme of last resort. See article,

<https://www.afca.org.au/news/latest-news/afca-pauses-complaints-against-insolvent-financial-firms>

AFCA acknowledge in its article that the CSLR legislation remains unfinished. Meanwhile AFCA continue to operate while vital legislation remains shelved. In other words AFCA is rendered powerless to provide the external dispute resolution (EDR) scheme that the Banking Royal Commission's recommendations intended but it carries on dealing with people in its current state. Therefore, the scheme Kenneth Hayne envisaged remains elusive. It's time the government and AFCA stop the deception, stop deceiving Australians and present an EDR that will provide justice to the people who had their savings stolen.

Conclusion

The Trio fraud is an example where a financial crime was politicised. Labor's union bias discriminated between people by supporting one group then knocked down another group. Liberal's acknowledged the government knew about financial crime in banking but saw no reason to stop the crime or hold an inquiry into bad behaviour. Liberal's opinion of financial crime victims is that they are too passive. Both parties released misinformation and made misleading statements about the Trio fraud.

The Trio victims were not passive; they represent honest hard working folk. They made up the work force, working in mines, at the steelworks, as teachers, office workers, skilled tradespersons, truck drivers, some operated their own business. Some of the Trio victims lost their family home. Others were forced to re-locate to another region. The trauma and suffering caused by the Trio crime has never been measured, meaning that there is no account of the impact that the Trio 'fraud' created.

A father in ill-health put his financial affairs in order to support his family and provide an education for his daughter. Directly after his passing, the family learnt that his money in Trio was gone. Trio victims were shell shocked about the devastating news that Trio's money may have disappeared. For over six months, there was uncertainty as to whether the money had indeed vanished. During that period, ASIC and Mr Shorten went after the financial adviser who had recommended Trio products to the AWU. They alleged poor financial advice. It took years for the matter to be played out in the courts and lawyers were the only winners. Trio had moderate returns over its 4-year operating life, confirmed by Research Houses and Star-Rating Firms. ASIC and APRA gave Trio the green light to operate. Despite these facts, ASIC went after 'poor advice' and ignored the insidious international crime where fraudsters had deceived the entire market.

The Western Australian Inc. Royal Commission second report tabled in November 1992, pointed out that 'Public Officials':

- *must act under and in accordance with the law;*
- *must exercise their offices honestly, impartially and disinterestedly and be seen to do so;*
- *must act fairly and with due regard to the rights and interests of the members of the public and of other public officials with whom they deal;*
- *must exercise their offices conscientiously and with due care and skill;*
- *must be scrupulous in their use of their position and of public property and of information to which they have access; and*
- *must be prudent in their management of public resources.*⁷⁴

ASIC and Mr Shorten failed to meet the above requirements. Nor did they consider,

*'...the power to appoint to a public office must be exercised for a public purpose, not for a private or political purpose.'*⁷⁵

ASIC and Mr Shorten actions and inactions had politicized the Trio crime.

The people that invested in Trio, in a scheme that diversified investments, did as the government had encouraged and recommended. The aim was to achieve a better retirement and reduce the burden on welfare. Under these circumstances the government could have accepted that its advice had harmed consumers. If the Trio victims can be blamed for anything, it would be for being too passive in trusting government agents and public servants. During the period when ASIC was supposedly investigating the Trio fraud, Mr Greg Medcraft travelled overseas on multiple trips at tax-payer expense, making James Shipton's tax expense appear tiny in comparison. Helen Coonan the 'Complaints Whisperer' at AFCA, also on Crown Casino board which was found heavily into money laundering, leaving AFCA complainants perplexed as the her alliance. Medcraft, Shipton and Coonan did nothing to prevent or resolve Trio's pre-fraud, fraud in action, and post-fraud stages. On examining each stage it became apparent that the public's best interest was never met.

Chief Justice Robert French in regards to Equitable Remedies writes,

A substantial part of the contribution of equity to administrative law has come from the use of the equitable remedies of injunction and declaration. The injunction is available to restrain threatened official conduct which is beyond power or otherwise unlawful. Interlocutory injunctions are an indispensable tool by which the status quo is maintained in judicial review applications pending their final hearing and determination.

*The place of the injunction in administrative law in Australia is secured by s 75(v) of the Constitution. That provision has become a bulwark of the rule of law. The injunction for which it provides stands as a constitutional remedy against unlawful executive action along with the constitutional writs of mandamus and prohibition.*⁷⁶

The Trio victims propose that under the unique circumstances surrounding Trio; the regulatory failure; the systemic issues; the politicization; the victimization etcetera, [some

⁷⁴ Roger Macknay QC TRUST IN PUBLIC OFFICE 2012 page 2

⁷⁵ Op. cit. Roger Macknay 2012 page 10

⁷⁶ Chief Justice Robert French Society of Trust and Estate Practitioners, The Interface between Equitable Principles and Public Law 29 October 2010 page 17

detailed in this submission], call for a remedy. Whether the remedy is by AFCA, by the government or by holding an independent inquiry into ASIC's and APRA's handling of Trio by a retire judge or someone like William Black, a former bank regulator. Mr Black is currently an Associate Professor of Economics and Law at the University of Missouri-Kansas City. The Trio victims deserve redress for a wrong done. They deserve justice.

ASIC and APRA missed opportunities to bust the fraud in its early days, but ultimately, the victims cop the blame. Industry failed to enlighten consumers clearly about legislation. One could suggest obfuscation plays a part in regulations and regulatory guides when approximately 80,000 pages⁷⁷ guide Australians to save for their retirement. Australia is a vibrant, multicultural country, are these 80,000 pages aimed at someone who doesn't have English as their first language? The complexity in running superannuation fuels the \$32 billion per year financial services industry. The government's vested interests in the superannuation pool, raises questions about integrity with mandating superannuation and then leaving victims of crime marooned, with no justice, no remedy - just blatant lies and more lies.

Lets have public discussion about whether AFCA is fit for purpose. Should compensation payment discriminate for wrongdoing?

Should someone who lost a substantial amount of money be remedied less than someone who lost a moderate amount?

Wouldn't such unfairness encourage fraudsters to rob larger sums of money?

AFCA need to apply what Kenneth Hayne suggested, '*stand in the shoes of a consumer*'. A Compensation Scheme of Last Resort would restore victims who are harmed for no fault of their own due to systemic issues, failed policy and regulation or due to misconduct in banking, insurance, superannuation, and the financial services industry.

The financial market needs something stronger and less captured than ASIC. For example, an Independent Commission Against Corruption (ICAC) with the tools to uncover money laundering and equipped with forensic skills to follow the money trail across international jurisdictions, and also to help keep politicians honest.

VOFF's submission shows how lies, misinformation and lack of a proper investigation including the cover up occurred at three stages of the Trio fraud. Before the fraud was conceptualized, during the 5-years operation of the fraud and post fraud. VOFF call for details of the Trio fraud, including ASIC's and APRA's handling of Trio, to be made public. Something must change because ASIC, AFCA and the government seem to willfully remain blind and indifferent to financial crime and the damage done to Australians.

John Telford

Secretary

Victims of Financial Fraud (VOFF Inc).

⁷⁷ David Millhouse 'Corporate Governance in Non-Bank Financial Entities' LexisNexis Australia 2019