

ENFORCEABLE UNDERTAKING

Superannuation Industry (Supervision) Act 1993 (Cth) - Section 262A

THIS UNDERTAKING IS GIVEN ON 1 July 2011

BY:

Natasha Beck (Ms Beck)
C/- Watson Mangioni Lawyers
of Level 13, 50 Carrington Street, Sydney, New South Wales 2000

AND IS ACCEPTED BY:

Australian Prudential Regulation Authority (APRA)
of Level 26, 400 George Street, Sydney, New South Wales 2000

UNDER:

Section 262A of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

A copy of section 262A of the SIS Act is at Schedule 1 to this Enforceable Undertaking.

A. BACKGROUND

APRA's Role & Powers

1. APRA has the functions and powers set out in the *Australian Prudential Regulation Authority Act 1998* and the SIS Act.
2. Pursuant to the SIS Act, APRA is responsible for ensuring the prudent management of certain superannuation funds and pooled superannuation trusts.
3. Under section 126H(1) of the SIS Act, APRA may apply to the Federal Court of Australia (the **Federal Court**) to disqualify an individual from being or acting in certain positions in relation to superannuation entities.

Trio Capital Ltd

4. Trio Capital Limited (In Liquidation) (formerly Astarra Capital Limited) ABN 33001277256 (Trio) was a trustee holding a registrable superannuation entity licence (RSE Licence) under the SIS Act.
5. Trio is the former trustee of the following superannuation entities:
 - (a) Astarra Superannuation Plan ABN 43724394795;
 - (b) Astarra Personal Pension Plan ABN 74351127106;
 - (c) My Retirement Plan ABN 23732008457;
 - (d) Employers Federation of NSW Superannuation Plan ABN 31061350115; and
 - (e) Astarra Pooled Superannuation Trust ABN 71340939814.

(collectively, the **Superannuation Entities**).

6. Ms Beck was a non-executive director of Trio from 18 June 2008 to 17 December 2009 (the **Relevant Period**) and was a responsible officer of Trio within the meaning of section 10 of the SIS Act. Ms Beck was a member of the Trio Investment Committee from 5 August 2009 to 17 December 2009.
7. On 16 December 2009, APRA suspended Trio as trustee of the Superannuation Entities and appointed ACT Super Management Pty Limited ABN 29 073 947 690 (**ACT Super**) as the Acting Trustee of the Superannuation Entities and Trio was placed into administration.
8. On 16 June 2010, APRA removed Trio as Trustee of the Superannuation Entities. On 22 June 2010, Trio was placed into liquidation.

SIS Act Covenants

9. The SIS Act imposed upon Trio certain covenants in respect of its role as trustee for the Superannuation Entities, relevantly including covenants:
 - (a) to exercise, in relation to all matters affecting the Superannuation Entities, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with the property of another for whom the person felt morally bound to provide: section 52(2)(b) of the SIS Act; and
 - (b) to ensure that its duties and powers were performed and exercised in the best interests of the beneficiaries of the Superannuation Entities: section 52(2)(c) of the SIS Act.
10. As a director of Trio, Ms Beck was subject to a covenant to exercise a reasonable degree of care and diligence for the purposes of ensuring that Trio carried out the covenants referred to in section 52(2), including those detailed in paragraph 9 above: section 52(8) of the SIS Act.
11. A contravention of the covenants referred to in section 52, including those detailed in paragraphs 9 and 10 above, constitutes a contravention of section 55(1) of the SIS Act.

APRA Investigation

12. On 16 October 2009, APRA commenced an investigation under section 263 of the SIS Act into the whole of the affairs of the Superannuation Entities (the **Investigation**).
13. As at the date of this Enforceable Undertaking the Investigation is ongoing.

The Exploration Fund Limited

14. The Exploration Fund Limited (formerly known as Huntleigh Investment Fund Limited) (the **EFL**) was a company incorporated in Saint Lucia on 8 October 2003 and operated as a hedge fund. According to the EFL's offer memorandum dated 8 November 2003, it was a newly formed company with no prior operating history.
15. The EFL appointed a Saint Lucia company, Global Financial Managers Limited (**GFML**) as investment manager and GFML delegated its duties in relation to Australian investors to Wright Global Investments Pty Limited ACN 097478487 (**WGI**). At all relevant times Shawn Richard was a director of WGI (Mr Richard). Mr Richard was also a director of Trio from 5 November 2003 to 15 November 2005 and a member of Trio's Investment Committee from February 2004 to December 2005 and December 2008 to August 2009. In

addition, at all relevant times Mr Richard, through various corporate entities, was the ultimate owner of Trio.

The Astarra Strategic Fund

16. On 28 August 2005 Trio established a managed investment scheme known as the Astarra Strategic Fund AFSN 115962368 (formerly the Alpha Strategic Fund) (the ASF). Trio was the responsible entity for the ASF and was responsible for the control, operations, functions and management of the ASF.
17. Astarra Asset Management Pty Limited (formerly Absolute Alpha Pty Limited) ACN 113 940 953 (In Liquidation) (AAM) was appointed by Trio as investment manager of the ASF. At all relevant times Mr Richard was a director of AAM and AAM was an authorised representative of WGI.
18. The ASF operated as a fund of hedge funds. AAM (as agent for Trio) entered into a Deferred Purchase Agreement (DPA) with EMA International Limited (EMA) when making investments with an investment manager in offshore global markets. EMA was incorporated in the British Virgin Islands and was a sole purpose vehicle established for the purpose of entering into the DPA's.
19. On 19 March 2010 the ASF was wound up by order of the Supreme Court of New South Wales pursuant to section 601ND(1)(a) of the *Corporations Act 2001*.

My Retirement Plan (Seagrims Sub Fund)

20. On 30 September 2008 Trio issued a Product Disclosure Statement for the My Retirement Plan (Seagrims Sub Fund) with Investment Options that included investments in the ASF (the **Seagrims PDS**).

Exposure to the EFL and ASF

21. In the period from May 2004 to October 2006, the Superannuation Entities made ongoing investments in the EFL. As at 30 June 2008 the investments held directly and indirectly by the Superannuation Entities in the EFL was approximately \$39.2 million.
22. In the period from October 2005 to October 2009, the Superannuation Entities made ongoing investments in the ASF. As at 30 June 2008 the investments held directly and indirectly by the Superannuation Entities in the ASF was approximately \$13.2 million. The direct and indirect exposure of the Superannuation Entities to the ASF increased from approximately \$13.2 million on 30 June 2008 to approximately \$18.9 million as at 30 September 2009, other than as a consequence of the In-Specie Transfer (as defined below). This increase in exposure included further investments pursuant to the Seagrims PDS.

The In-Specie Transfer

23. Effective 30 June 2009, Trio transferred the units in the EFL held by the Superannuation Entities to the ASF with equivalent units in the ASF being issued to the Superannuation Entities (the **In-Specie Transfer**). At the time of the In-Specie Transfer, the value of the direct investments held by the Superannuation Entities in the EFL was approximately \$43 million.

Loss of the Superannuation Entities' investments in the ASF

24. As at 30 September 2009 the value of the Superannuation Entities' investments in the ASF (which included the investments in the EFL that had been transferred by the In-Specie Transfer) was approximately \$62.2 million. ACT Super, as Acting Trustee for the Superannuation Entities, has been unable to redeem any of the Superannuation Entities' investments in the ASF and has determined that the funds have been lost due to fraud or theft.

B. APRA's CONCERNS

25. APRA is concerned that during the Relevant Period Ms Beck and/or Trio may have contravened section 55(1) of the SIS Act by:
- (a) Failing to pursue a complete redemption of the Superannuation Entities' investments in the EFL given the:
 - (i) material value of the investments held directly and indirectly by the Superannuation Entities in the EFL, being approximately \$39.2 million as at 30 June 2008;
 - (ii) investments in the EFL were related party investments because Mr Richard, the CEO and director of the delegated investment manager of the EFL, WGI, was also the owner of Trio;
 - (iii) absence of any adequate and credible information about the performance or valuation of the EFL, especially having regard to the:
 - (A) issues raised in Trio's audit report for the year ended 30 June 2008 in relation to the valuation of the EFL;
 - (B) issues raised by APRA, including arising out of the Prudential Review undertaken on 28 August 2008, in relation to the valuation methodology for unlisted assets such as the EFL; and
 - (C) response to APRA by Trio dated 23 October 2008 confirming it did not have available valuations of the EFL; and
 - (iv) Trio's failure to comply with its Overarching Investment Policy and Investment Committee Charter, in particular those provisions relating to hedge fund investments and investments with related parties;
 - (b) Causing or failing to cease ongoing investments by the Superannuation Entities in the ASF given the:
 - (i) material value of the investments held directly and indirectly by the Superannuation Entities in the ASF, being approximately \$13.2 million as at 30 June 2008;
 - (ii) increase in the direct and indirect exposure of the Superannuation Entities to the ASF from approximately \$13.2 million on 30 June 2008 to approximately \$18.9 million as at 30 September 2009, other than as a consequence of the In-Specie Transfer;
 - (iii) investment in the ASF was a related party investment because Mr Richard, the CEO and director of AAM, the appointed investment manager for the ASF, was also the owner of Trio;
 - (iv) failure to adequately consider the risk associated with the investment structure of the ASF, including the investments in offshore hedge funds (the **Underlying Funds**) via DPAs in circumstances where:
 - (A) Trio was not a party to the Master DPA executed between AAM and EMA;

- (B) there was counter-party risk associated with EMA and its custodian, Global Consultants Services Limited (GCSL), in terms of EMA's capacity and willingness to perform its obligations under the Master DPA and DPAs;
- (C) Trio did not have any direct control of, or association with, either EMA or GCSL;
- (D) the ASF was not provided with any direct legal or beneficial interests in the Underlying Funds or their assets following investments made by EMA; and
- (E) neither pursuant to the Master DPA nor the DPAs did EMA provide any security or collateral to support the ASF's contractual right (via AAM) to receive the 'delivery asset parcels' from EMA;
- (v) EFL was one of the Underlying Funds;
- (vi) lack of adequate monitoring by Trio of AAM as investment manager of the ASF, including the absence of focus on AAM's monitoring of the investment strategies, performance and valuations of the Underlying Funds;
- (vii) absence of any adequate and credible information about the existence, performance and valuation of the Underlying Funds and the failure to make appropriate enquiries about such information, especially having regard to the:
 - (A) issues raised in Trio's audit report for the year ended 30 June 2008 in relation to the valuation of the EFL;
 - (B) issues raised by APRA, including arising out of the Prudential Review undertaken on 28 August 2008, in relation to the valuation methodology for unlisted assets such as the ASF and the EFL; and
 - (C) response to APRA by Trio dated 23 October 2008 confirming it did not have available valuations of the ASF or the EFL;
- (viii) failure to give adequate consideration to the investment risk associated with the Underlying Funds;
- (ix) failure to give adequate consideration to the liquidity risk associated with the Underlying Funds; and
- (x) Trio's failure to comply with its Overarching Investment Policy and Investment Committee Charter, in particular those provisions relating to hedge fund investments and investments with related parties;
- (c) Failing to seek a redemption of the Superannuation Entities' investments in the ASF given the matters set out in paragraph 25(b) above;
- (d) Causing the interests held by the Superannuation Entities in the EFL to be transferred to the ASF pursuant to the In-Specie Transfer given the:
 - (i) material value of the direct investments held by the Superannuation Entities in the EFL of approximately \$43 million which were transferred;
 - (ii) absence of any adequate advice on or analysis of:
 - (A) the implications of the In-Specie Transfer on the interests of the members of the Superannuation Entities including:
 - 1) the placing of their investments under the managerial control of AAM given the matters detailed at sub-paragraphs 25(b)(iii), (vi) and (vii) above; and
 - 2) the placing of their investments behind the DPA structure with EMA given the matters detailed at sub-paragraph 25(b)(iv) above; and

- (B) any alternative options available to Trio to improve the liquidity management of the Superannuation Entities, including pursuing a complete redemption of their investments in the EFL.

C. ACKNOWLEDGMENT OF APRA's CONCERNS

26. Ms Beck acknowledges the concerns held by APRA referred to in paragraph 25 above.
27. Ms Beck accepts that, with the benefit of hindsight, and what has since transpired, she should have acted differently in relation to the matters the subject of APRA's concerns as set out in paragraph 25 above. Ms Beck genuinely regrets the consequences which arose from those matters.
28. Ms Beck acknowledges and accepts APRA's view that, having regard to the nature and extent of the matters identified in paragraph 25 above, an appropriate period of disqualification from being or acting as a trustee of a superannuation entity or from being or acting as a responsible officer of a body corporate that is a trustee, investment manager or custodian of a superannuation entity is 5 years.
29. On the basis that Ms Beck:
- (a) was a non-executive director;
 - (b) joined the Trio board after the initial investments in the EFL and many of the initial investments by the ASF in the Underlying Funds were made;
 - (c) was not a member of the Trio Risk & Compliance Committee and was a member of the Trio Investment Committee for a short period of time only;
 - (d) has sought to resolve APRA's concerns at an early stage by the offering of this Enforceable Undertaking; and
 - (e) has expressed her remorse and contrition as noted in paragraph 27 above;
- APRA accepts the undertakings in paragraph 30 below.

D. UNDERTAKINGS

30. Under section 262A of the SIS Act, Ms Beck has offered and APRA has agreed to accept, as an alternative to APRA exercising its regulatory powers, including its power under section 126H(1) of the SIS Act to apply to the Federal Court for a disqualification order, undertakings that Ms Beck will not at any time for a period of 4 years from the date of this Enforceable Undertaking be or act as:
- (a) a trustee of a registrable superannuation entity (as defined under the SIS Act); or
 - (b) a responsible officer of any body corporate that is a trustee, investment manager or custodian of a registrable superannuation entity (as defined under the SIS Act).

Undertaking to co-operate with APRA in relation to the Investigation

31. On the date of this Enforceable Undertaking, Ms Beck entered into a Co-operation Undertaking with APRA (separate to this Enforceable Undertaking) (the **Co-operation Undertaking**) agreeing to:
- (a) provide to APRA a full, frank and truthful statement and/or affidavit in writing in relation to her role as a member of the Board of Trio in the Relevant Period and otherwise assist APRA in the Investigation as set out in the Co-operation Undertaking;

- (b) provide any further statement and/or affidavit concerning her role as a member of the Board of Trio during the Relevant Period as is reasonably required by APRA;
- (c) give full, frank and truthful evidence for APRA in relation to the matters set out in her statement/s and/or affidavit/s and any information she provides to APRA or any other matters relating to her role as a member of the Board of Trio in any court proceedings that APRA may commence, (whether of a criminal, civil penalty or administrative nature) in respect of any person in relation to the Investigation, substantially in accordance with her statement/s and /or affidavit/s; and
- (d) confer with APRA or any counsel briefed by APRA in relation to her statement/s and/or affidavit/s or in relation to her giving evidence in any proceedings APRA may commence.

Undertaking to complete training

32. Ms Beck further undertakes that prior to seeking appointment to be or act as:

- (a) a trustee of a registrable superannuation entity (as defined under the SIS Act); or
- (b) a responsible officer of any body corporate that is a trustee, investment manager or custodian of a registrable superannuation entity (as defined under the SIS Act);

she will complete a course or training, as reasonably required by APRA and to be approved in advance by APRA in writing, relating to:

- (c) the duties of a trustee of a registrable superannuation entity, including the duties imposed pursuant to the SIS Act and any other related legislation; and
- (d) best practice in managing investments and investment managers.

E. POTENTIAL VARIATION OF TERM OF UNDERTAKING

33. APRA agrees that it may at the request of Ms Beck, reduce the term of the undertakings set out in paragraph 30 above from a period of 4 years to a period of 2 years from the date of this Enforceable Undertaking if APRA is satisfied that:

- (a) in the provision of such statement/s and/or affidavit/s referred to in paragraphs 31 (a) and (b) above, Ms Beck's cooperation has been full, frank and truthful;
- (b) the evidence in the statement or affidavit that Ms Beck could give is of material assistance and utility to APRA, which will include an assessment by APRA of Ms Beck's credibility and reliability as a witness; and
- (c) Ms Beck's co-operation and evidence given in any proceedings that APRA may commence in respect of any person in relation to the Investigation is full, frank and truthful and substantially in accordance with the statement/s and/or affidavit/s referred to in paragraphs 31 (a) and (b) above.

F. ACKNOWLEDGMENTS

34. Ms Beck acknowledges that:

- (a) this Enforceable Undertaking has no operative force until accepted by APRA and that the date of this Enforceable Undertaking is the date it is accepted by APRA;
- (b) this Enforceable Undertaking is given by Ms Beck voluntarily and she has obtained legal advice in relation to her obligations under, and the effect of, this Enforceable Undertaking;
- (c) Ms Beck acknowledges that this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this Enforceable Undertaking or in the Co-operation Undertaking or arising from future conduct; and
- (d) APRA's acceptance of this Enforceable Undertaking does not affect APRA's power to take action arising from any conduct:
 - (i) not specified in this Enforceable Undertaking or in the Co-operation Undertaking; or
 - (ii) any future conduct.

35. Ms Beck acknowledges that APRA:

- (a) may from time to time refer publicly to this Enforceable Undertaking;
- (b) may make this Enforceable Undertaking public and may publish it on APRA's website at www.apra.gov.au; and/or
- (c) may issue a media release on execution of the Enforceable Undertaking referring to its terms and to APRA's concerns which led to its execution.

36. Ms Beck acknowledges that if any part of this Enforceable Undertaking is held invalid that part shall be severed from this Enforceable Undertaking and the remainder of this Enforceable Undertaking will continue to be valid and enforceable.

37. The references to provisions of Commonwealth Acts of Parliament in this Undertaking shall include references to those provisions as amended from time to time and in the event of a repeal of any of them, any equivalent provision from time to time.

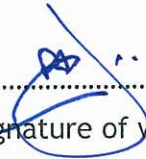
38. For the purposes of this Enforceable Undertaking, any correspondence may be sent to Ms Beck at C/- Watson Mangioni Lawyers (Attention: Robert Mangioni), at Level 13, 50 Carrington Street, Sydney, NSW 2000, and to APRA at the General Manager - Enforcement, at APRA's office at Level 26, 400 George Street, Sydney, NSW 2000.

SIGNED by Natasha Beck:


.....

Natasha Beck

In the presence of:


.....
[Signature of witness]

Robert M. G. D. J.
.....

[Print name of witness]

Accepted by a delegate of APRA:


.....

[Name of delegate] LOUIS SERRET

In the presence of:


.....

[Signature of witness]

C. A. SHEEHAN
.....

[Print name of witness]

SCHEDULE 1

SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993

SECTION 262A

Acceptance and enforcement of undertakings

- (1) The Regulator may accept a written undertaking given by a person in connection with a matter in relation to which the Regulator has a function or power under this Act.
- (2) The person may withdraw or vary the undertaking at any time, but only with the Regulator's consent.
- (3) If the Regulator considers that the person who gave the undertaking has breached any of its terms, the Regulator may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.