

ENFORCEABLE UNDERTAKING

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

THIS UNDERTAKING IS GIVEN ON 12 SEPTEMBER 2011

BY:

Keith Rex Finkelde (Mr Finkelde)
C/- Maddocks Lawyers
of 140 William Street, Melbourne, VIC 3000

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. During the period 24 April 2007 to 17 December 2009, Mr Finkelde held the positions of:
 - (a) non executive director; and
 - (b) member of the investment committee from 30 July 2008 to 17 December 2009;of Trio and was a responsible officer of Trio within the meaning of section 10 of the SIS Act.
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, Mr Finkelde 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 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 DPAs.
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. As a result of the Investigation APRA has concerns that during the period 24 April 2007 to 16 December 2009 Mr Finkelde 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 size of the investments held directly and indirectly by the Superannuation Entities in the EFL, being approximately \$34.3 million as at 30 April 2007;
 - (i) lack of arms length arrangements in place with the investments in the EFL, which 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;
 - (ii) absence of any adequate and credible information about the performance or valuation of the EFL; and
 - (iii) 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 Astarra Strategic Fund (the ASF) given the:
 - (i) material value of the investments held directly and indirectly by the Superannuation Entities in the ASF, being approximately \$12.4 million as at 30 April 2007;
 - (ii) increase in the direct and indirect exposure of the Superannuation Entities to the ASF from approximately \$12.4 million as at 30 April 2007 to approximately:
 - (A) \$13.2 million as at 30 June 2008;
 - (B) \$18.6 million as at 30 June 2009 (other than as a consequence of the In-Specie Transfer as defined below); and
 - (C) \$18.9 million as at 30 September 2009, (other than as a consequence of the In-Specie Transfer as defined below);
 - (iii) lack of arms length arrangements in place with the investment in the ASF, which was a related party investment because, Mr Richard, the CEO and director of Astarra Asset Management Pty Ltd (formerly known as Absolute Alpha Pty Ltd) (AAM) the appointed investment manager for the ASF, was also the owner of Trio;
 - (iv) failure to adequately consider the risk associated 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 International Limited (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;
 - (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 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 (b) above.
- (d) Causing the interests held by the Superannuation Entities in the EFL to be transferred to the ASF, effective 30 June 2009, with equivalent value units being issued in the ASF (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 as at 30 June 2009 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. Mr Finkelde acknowledges the concerns held by APRA referred to in paragraph 25 above.

27. Mr Finkelde accepts that, with the benefit of hindsight, and what has since transpired, he should have acted differently in relation to the matters the subject of APRA's concerns as set out in paragraph 25 above. Mr Finkelde genuinely regrets the consequences which arose from those matters.

D. UNDERTAKINGS

28. Under section 262A of the SIS Act, Mr Finkelde 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 Mr Finkelde will not at any time for a period of 6 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 complete training

29. Mr Finkelde 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);

he 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. ACKNOWLEDGMENTS

30. Mr Finkelde 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 Mr Finkelde voluntarily and he has obtained legal advice in relation to his obligations under, and the effect of, this Enforceable Undertaking;
- (c) Mr Finkelde 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 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
- (ii) any future conduct.

31. Mr Finkelde 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.

32. Mr Finkelde 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.

33. The references to provisions of Commonwealth Acts of Parliament in this Enforceable 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.


34. For the purposes of this Enforceable Undertaking, any correspondence may be sent to APRA at the General Manager - Enforcement, at APRA's office at Level 26, 400 George Street, Sydney, NSW 2000.

SIGNED by Keith Rex Finkelde:


.....

Keith Rex Finkelde

In the presence of:


.....

[Signature of witness]

NIKI STENTSIOTIS
.....

[Print name of witness]

Accepted by a delegate of APRA:


.....

[Name of delegate]

LOUIS SERRET

19 SEPTEMBER 2011

In the presence of:

L Weate

[Signature of witness]

LUTHER WEATE

[Print name of witness]

Level 26

400 George Street

Sydney 2000

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.