

ENFORCEABLE UNDERTAKING

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

THIS UNDERTAKING IS GIVEN ON 2 March 2012

BY:

John Alan Godfrey (Mr Godfrey)
of c/- Freehills, Lawyers, 19-29 Martin Place, Sydney, New South Wales

AND IS ACCEPTED BY:

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

UNDER:

Section 262A of the *Superannuation Industry (Supervision) Act 1993 (Cth) (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 (Cth)* 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 (**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 33 001 277 256 (**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 Mr Godfrey held the positions of:

- (a) non-executive director from 4 February 2005 to 27 June 2007; and
- (b) Chairman of the Board from 22 June 2005 to 28 February 2007;

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 each Superannuation Entity, 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 Entity: section 52(2)(c) of the SIS Act.

10 As a director of Trio, Mr Godfrey 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 (**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) (**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 097 478 487 (**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) (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* (Cth).

Exposure to the EFL and ASF

- 20 In the period from May 2004 to October 2006, Trio made ongoing investments of the assets of the Superannuation Entities in the EFL. As at 30 June 2008 the investments held directly and indirectly by Trio (as assets of the Superannuation Entities) in the EFL was approximately \$39.2 million.
- 21 In the period from October 2005 to June 2007 while Mr Godfrey was a responsible officer of Trio, Trio made ongoing investments of the assets of the Superannuation Entities in the ASF. As at 30 June 2007 the investments held directly and indirectly by Trio (as assets of the Superannuation Entities) in the ASF was approximately \$11.0 million.

Loss of the Superannuation Entities' investments in the ASF

- 22 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 to the ASF by way of an In-Specie Transfer in June 2009) 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

- 23 As a result of the Investigation APRA has concerns that during the period 4 February 2005 to 27 June 2007 Mr Godfrey and/or Trio may have contravened section 55(1) of the SIS Act by:
 - (a) Causing or failing to cease ongoing investments by the Superannuation Entities' in the EFL given the:
 - (i) material size of the investments held directly and indirectly by Trio as assets of the Superannuation Entities in the EFL, being approximately \$25.6 million as at 31 March 2006;
 - (ii) increase in the direct and indirect exposure of the assets of the Superannuation Entities to the EFL from approximately

\$25.6 million as at 31 March 2006 to approximately \$31.4 million as at 31 October 2006;

- (iii) 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;
 - (iv) investment risk associated with the EFL, including the risks disclosed in the Information Memoranda issued by the EFL including that:
 - (A) at the time of Trio's initial investment, the EFL was a newly formed company and had no prior operating history;
 - (B) investment in the EFL was speculative and involved a high degree of risk; and
 - (C) the EFL was registered and domiciled in Saint Lucia, West Indies, and thus was not subject to Australian or similar regulatory oversight;
 - (v) liquidity risk associated with the EFL, including the risks associated with the potential deferral of the payment of redemptions by the EFL for a period up to 12 months;
 - (iv) absence of any adequate and credible information about the performance or valuation of the EFL; and
 - (v) 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) 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 \$34.2 million as at 31 May 2007;
 - (ii) matters set out in paragraph (a) above;
 - (iii) absence of any adequate and credible information about the performance or valuation of the EFL;
- (c) Causing or failing to cease ongoing investments of the assets of the Superannuation Entities in the ASF given the:
- (i) material value of the investments held directly and indirectly by Trio as the assets of the Superannuation Entities in the ASF, being approximately \$10.5 million as at 31 March 2006;
 - (ii) increase in the direct and indirect exposure of the assets of the Superannuation Entities to the ASF from approximately \$10.5 million as at 31 March 2006 to approximately \$11.5 million as at 31 May 2007;
 - (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 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 (**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;
 - (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.
- (d) Failing to seek a redemption of the assets of Superannuation Entities that were invested in the ASF given the matters set out in paragraph (c) above.

C. ACKNOWLEDGMENT OF APRA's CONCERNS

- 24 Mr Godfrey acknowledges the concerns held by APRA referred to in paragraph 23 above.
- 25 Mr Godfrey 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 23 above. Mr Godfrey genuinely regrets the consequences which arose from those matters.
- 26 On that basis that Mr Godfrey:
- (a) was a non-executive director;

- (b) is 68 years of age and has indicated that he has no present or foreseeable intention to request APRA's consent for him to be or act as a Relevant Officer as contemplated in paragraph 27; and
 - (c) has expressed his remorse and contrition as noted in paragraph 25;
- APRA accepts the undertakings in paragraph 27 below.

D. UNDERTAKINGS

27 Under section 262A of the SIS Act, Mr Godfrey 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 Godfrey will not, without obtaining APRA's prior written consent, be or act as:

- (a) a trustee of a registrable superannuation entity (as defined in 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 in the SIS Act);

(such role of trustee and responsible officer being each referred to hereafter as a **Relevant Officer**).

28 Mr Godfrey further undertakes that prior to seeking appointment to be or act as a Relevant Officer, he will complete a course or training, as reasonably required by APRA and to be approved in advance by APRA in writing, relating to:

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

E. ACKNOWLEDGMENTS

29 Mr Godfrey 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 Godfrey voluntarily and he has obtained legal advice in relation to his obligations under, and the effect of, this Enforceable Undertaking;
- (c) Mr Godfrey 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.

30 Mr Godfrey 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.
- 31 Mr Godfrey 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.
- 32 APRA acknowledges that nothing in this Enforceable Undertaking constitutes an admission by Mr Godfrey.
- 33 Mr Godfrey acknowledges that he has no present or foreseeable intention to request APRA's consent for him to be or act as a Relevant Officer as contemplated in paragraph 27.
- 34 Mr Godfrey acknowledges that in considering whether to provide its consent to Mr Godfrey as required by paragraph 27, APRA:
- (a) will have an absolute and unfettered discretion; and
 - (b) without limitation or qualification to paragraph (a), may take into account:
 - (i) the fitness of Mr Godfrey to be or act as a Relevant Officer, including but not limited to the completion of the training as required by paragraph 28 of this Enforceable Undertaking; and
 - (ii) the propriety of Mr Godfrey to be or act as a Relevant Officer including but not limited to the conduct and concerns referred to in paragraph 23, including APRA's concerns that Mr Godfrey has contravened section 55(1) of the SIS Act; and
 - (iii) the time that has elapsed between the date of this Enforceable Undertaking and any request by Mr Godfrey to APRA for consent.
- 35 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.
- 36 For the purposes of this Enforceable Undertaking, any correspondence may be sent to APRA c/- General Manager - Enforcement, at APRA's office at Level 26, 400 George Street, Sydney, NSW 2000.

SIGNED by John Godfrey:



John Godfrey

In the presence of:



[signature of witness]

.....
Lisa Beatty
[print name of witness]

Accepted by a delegate of APRA:

.....
[Name of delegate] Louis Serret
In the presence of: 5 March 2012

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Lut Weate
[signature of witness]

.....
LUTHER BENJAMIN WEATE
[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.

