

Superannuation Industry (Supervision) Act 1993
ENFORCEABLE UNDERTAKING - LORENZO PATRICK MACOLINO

THIS UNDERTAKING IS GIVEN ON 28 June 2013

BY:

Lorenzo Patrick Macolino of address known to APRA
Date of birth: 04/02/1961

AND IS ACCEPTED BY:

Australian Prudential Regulation Authority
of Level 26, 400 George Street, Sydney, NSW 2000

UNDER:

Section 262A of the *Superannuation Industry (Supervision) Act 1993*
A copy of section 262A of the SIS Act is at Schedule 1 to this Enforceable Undertaking.

A. DEFINITIONS

ACT Super means ACT Super Management Pty Limited ABN 29 073 947 690

APRA means the Australian Prudential Regulation Authority

ARP Growth Fund means ARP Growth Fund ARSN 112 315 036, a managed investment scheme under the Corporations Act to which Trio acted as responsible entity

ASF means Astarra Strategic Fund ARSN 115962368 (formerly the Alpha Strategic Fund), a managed investment scheme under the Corporations Act to which Trio acted as responsible entity

Astarra Nominees means Astarra Nominees (Australia) Pty Limited ACN 003 983 917 (In Liquidation), the trustee of Marq Private Equity Trust No 1

Astarra Securities means Astarra Securities Pty Limited ACN 109 078 319 (In Liquidation), the trustee of Marq Private Equity Trust No 2

AFM means Astarra Funds Management Pty Limited ACN 098 220 467 (In Liquidation)

Corporations Act means the *Corporations Act 2001* (Cth)

EFL means the Exploration Fund Limited (formerly known as Huntleigh Investment Fund Limited)

Federal Court means the Federal Court of Australia

Mr Flader means Jack Flader, a US citizen and associate of Mr Richard not resident in Australia

GCSL means Global Consultants Services Limited, a custodial company incorporated in Hong Kong

GFML means Global Financial Managers Limited, a company incorporated in St Lucia

Mr Gresham means Paul Anthony Gresham (now known as Tony Maher)

Mr Hallinan means Terrence Hallinan

Investigation means the investigation by APRA under section 263 of the SIS Act into the Superannuation Entities commenced on 16 October 2009 and the PPPST commenced on 25 October 2011

Mr Macolino means Lorenzo Patrick Macolino

MIAG means Millhouse IAG Limited (In Liquidation) ACN 091 881 097, an authorised representative of WGI

Mr Millhouse means David Guy Millhouse

PPARP means Professional Pensions ARP Limited, a company incorporated in the British Virgin Islands

PPPST means Professional Pensions Pooled Superannuation Trust ABN 27 659 128 466, a pooled superannuation trust registered under the SIS Act

PSTM means PST Management Pty Ltd ACN 077 522 242, the authorised representative of WGI

Relevant Period means 5 November 2003 to 17 December 2004

Mr Richard means Shawn Darrell Richard

RSE Licence means a registrable superannuation entity licence under the SIS Act

SAM means Silverhall Asset Management Pty Ltd (now known as ACN 108 352 441 Pty Ltd (In Liquidation)), an authorised representative of WGI

SIS Act means the *Superannuation Industry (Supervision) Act 1993* (Cth)

Subsequent Investigation means a further investigation by APRA under section 263 of the SIS Act than the Investigation

Superannuation Entities means the following superannuation funds regulated under the SIS Act:

- (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

SRPH means Silverhall Residential Property Holdings Pty Ltd (now known as Ualan Property Holdings Pty Ltd (In Liquidation) ACN 111 842 543)

Trio means Trio Capital Limited (In Liquidation) ACN 001277256 (formerly Astarra Capital Limited)

WGAM means Wright Global Asset Management Pty Limited ACN 105796754, a deregistered company

WGI means Wright Global Investments Pty Limited (In Liquidation) ACN 097478487 AFSL No. 225058

B. BACKGROUND

I. 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 of the SIS Act, APRA may apply to the Federal Court for an order to disqualify an individual from being or acting in certain positions in relation to superannuation entities if:
 - (a) that person contravened the SIS Act: section 126H(1), section 126H(3); and/or
 - (b) was a responsible officer of a body corporate at the time the body corporate contravened the SIS Act: section 126H(1), section 126H(4).

Trio

4. Trio was the holder of an RSE Licence and the former trustee of the Superannuation Entities and the PPPST.
5. On 16 December 2009, APRA suspended Trio as trustee of the Superannuation Entities and appointed ACT Super as the Acting Trustee of the Superannuation Entities and Trio was placed into administration.
6. On 16 June 2010, APRA removed Trio as Trustee of the Superannuation Entities. On 22 June 2010, Trio was placed into liquidation.
7. During the Relevant Period, Mr Macolino held the position of director and was a responsible officer of Trio within the meaning of section 10 of the SIS Act.

SIS Act covenants

8. 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.
9. As a director of Trio, Mr Macolino 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 at paragraph 8: section 52(8) of the SIS Act.
10. A contravention of the covenants referred to in section 52, including those detailed in paragraphs 8 and 9, constitutes a contravention of section 55(1) of the SIS Act.

Provisions relating to non-arm's length investments

11. Section 109 of the SIS Act prohibited Trio from making or maintaining investments unless:
 - (a) Trio dealt with another party to the transaction at arm's length: section 109(1)(a); or
 - (b) if the other party was not at arm's length, Trio dealt with the other party on terms that were no more favourable than if the parties were dealing at arm's length: section 109(1)(b) & 109(1A).

II. INVESTMENTS

The EFL and ASF

12. The EFL was a company incorporated in Saint Lucia and operated as an offshore hedge fund from early 2004.
13. The EFL was a newly formed company with no operating history. An investment in the EFL was a speculative and high risk investment. Huntleigh Securities Incorporated was EFL's prime broker and custodian but EFL was not obligated to maintain that relationship.
14. During the Relevant Period, the Superannuation Entities and the PPPST made direct and indirect investments in the EFL totalling approximately \$20.9 million.
15. The investment in the EFL was transferred into the ASF in June 2009. The ASF was a managed investment scheme to which Trio acted as responsible entity .
16. 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).
17. ACT Super has been unable to redeem any of the Superannuation Entities' investments in the ASF, including those pertaining to the EFL. ACT Super has determined that the funds have been lost due to fraud or theft.

SRPH

18. SRPH was incorporated in November 2004 and was involved in developing residential property through subsidiary entities. The Superannuation Entities collectively owned approximately 90% of the shares in SRPH.
19. SRPH had no assets, other than the share capital that was to be provided by Trio. SRPH had the right to defer shareholder redemptions for 24 months. Trio's investment in SRPH was unsecured. Trio's investments in SRPH ranked behind the secured and unsecured creditors of SRPH in the event SRPH became insolvent.
20. During the Relevant Period, the Superannuation Entities invested approximately \$9 million into SRPH.
21. On 26 August 2010 a liquidator was appointed to SRPH. ACT Super has been unable to redeem any of the investments in SRPH on behalf of the Superannuation Entities.

The PPPST & PPARP

22. PPARP was a British Virgin Islands Segregated Portfolio Mutual Company in which the PPPST invested pursuant to a Private Placement Memorandum of 1 December 2004. The PPPST was the largest investor in the PPARP.
23. PPARP was a newly organised entity and had no operating history. An investment in PPARP was illiquid, there was no market for shares in PPARP and it was not expected a market would develop. An investment in PPARP was speculative and involved a high degree of risk.
24. During the Relevant Period, approximately \$44 million was invested into the PPARP by the PPPST.
25. In about July 2007 the PPPST ceased to be a pooled superannuation trust within the meaning of the SIS Act. Units in the PPPST (which was renamed ARP Sub-Trust No 1) were transferred to the ARP Growth Fund and the majority of unitholders in PPPST were issued units in the ARP Growth Fund.

26. Trio has been unable to redeem the investments in the PPARP. The liquidator of Trio does not expect to recover any of the investments in the PPARP on behalf of unitholders in the ARP Growth Fund.

MPET1&2

27. In May 2004 Trio became the founding investor of MPET1&2 which were unlisted unit trusts. Astarra Nominees and Astarra Securities acted as trustees of MPET 1 & 2. MIAG acted as an authorised representative of the MPET1&2 investment manager, WGI.
28. MPET 1 & 2 had no prior operating history. MPET 1 & 2 focussed on a limited number of offshore private equity investments in Europe and Asia which were speculative and illiquid.
29. By the end of the Relevant Period, the Superannuation Entities had invested approximately \$9.3 million in the MPET1&2.
30. On 10 September 2009 the Supreme Court of New South Wales appointed a liquidator to Astarra Nominees and Astarra Securities. On 11 June 2010, MIAG was placed into liquidation.
31. The majority of the Superannuation Entities' investments in MPET1&2 appear to be unrecoverable.

III. NON-ARM'S LENGTH ARRANGEMENTS

Trio

32. Trio's directors included:
- (a) Mr Macolino during the Relevant Period;
 - (b) Mr Cameron Anderson from 5 November 2003 to 15 November 2005;
 - (c) Mr Michael Anderson from 24 February 2005 to 12 October 2005;
 - (d) Mr Hallinan from 5 November 2003 to 17 December 2004;
 - (e) Mr Millhouse from 5 November 2003 to 12 October 2005 and
 - (f) Mr Richard from 5 November 2003 to 15 November 2005.
33. Trio's immediate holding company was AFM. Mr Richard was a director of AFM from 5 November 2003 to 24 April 2007. Mr Jack Flader (a US citizen and associate of Mr Richard) was a director of AFM from 16 December 2004 until 8 August 2005. Mr Millhouse was a director of AFM from 5 November 2003 to 25 October 2006. Mr Cameron Anderson was a director of AFM from 5 November 2003 to 20 April 2006.
34. Trio's ultimate holding company was WGAM. WGAM was owned by Bella Donna Limited, a company registered overseas believed to be controlled by Mr Flader and Mr Richard. WGAM had as its director Mr Richard from 5 August 2003 until its deregistration on 8 January 2012. Mr Cameron Anderson was a director of WGAM from 5 August 2003 to 20 April 2006. Mr Millhouse was a director of WGAM from 5 November 2003 to 25 October 2006. Mr Macolino was a director of WGAM from 5 November 2003 to 2 December 2004.
35. Trio appointed WGI as an investment manager in respect of certain of the investment options, namely the Absolute Return Pool and Overseas Equities Pool. Mr Richard was a director of WGI from 12 July 2001 to 16 September 2009. WGI was placed into liquidation on 2 August 2011.

36. Trio appointed SAM as an investment manager in respect of certain of the investment options, namely the Residential Property Pool and the Property Pool. SAM was placed into liquidation on 2 July 2009.
37. Trio appointed MIAG as an investment manager in respect of certain of the investment options, namely the Private Equity Pool, Overseas Equities Pool, Diversified Fixed Interest Pool and Australian Equities Pool. MIAG was placed into liquidation on 11 June 2010.

The EFL

38. EFL appointed GFML as its investment manager. GFML delegated its duties in relation to Australian investors to WGI.
39. Mr Carl Meerveld, an associate of Mr Flader, was a director of the EFL. Mr Frank Richard Bell was a director of EFL and Trio's acting Compliance Officer.
40. Trio's investments in the EFL were not at arm's length and the terms of the investment were not no more favourable than if the parties were dealing at arm's length.

SRPH

41. Mr Cameron Anderson, Mr Michael Anderson and Mr Richard were directors of SRPH from 17 November 2004 to 26 March 2009.
42. Trio appointed WGI and SAM as investment managers for SRPH. SAM was appointed as authorised representative of WGI for the purpose of undertaking investments by Trio into the SRPH.
43. Mr Cameron Anderson, Mr Michael Anderson and Mr Richard were directors of SAM from 15 March 2004 until it entered liquidation on 2 July 2009. Mr Hallinan was also a director of SAM from 18 November 2004 to 31 December 2004.
44. Mr Cameron Anderson, Mr Michael Anderson and Mr Hallinan were also directors of various subsidiary project companies of SRPH.
45. Trio's investments in SRPH were not at arm's length and the terms of the investment were not no more favourable than if the parties were dealing at arm's length.

PPARP

46. PPARP was administered by PSTM, the authorised representative of WGI, which was the investment manager of the PPPST.
47. Mr Paul Anthony Gresham (now known as Tony Maher) was a director of PSTM from 17 February 1997 until its entry into liquidation on 9 July 2010. Mr Gresham was also a director of PPARP. Mr Gresham made recommendations to the Trio Board regarding investing the PPPST into PPARP.
48. Mr James Sutherland was a director of PPARP and an associate of Mr Flader and Mr Richard. Mr Phillip York was the managing director of Empyreal which was the fund manager of PPARP, and was also a responsible officer of WGI.
49. Trio's investments in the PPARP were not at arm's length and the terms of the investment were not no more favourable than if the parties were dealing at arm's length.

MPET1&2

50. Astarra Nominees and Astarra Securities acted as trustees of MPET1&2 and WGI acted as investment manager. MIAG acted as an authorised representative of WGI

for the purposes of the MPET1&2. Mr Millhouse and Mr Macolino were directors of MIAG.

51. Mr Macolino, Mr Cameron Anderson, Mr Michael Anderson, Mr Millhouse, Mr Hallinan and Mr Richard held directorships of Astarra Nominees of varying terms commencing on 5 November 2003 (save for Mr Michael Anderson who commenced on 27 April 2005). Mr Richard was a director of Astarra Securities from 13 May 2004 to 26 October 2007.
52. Trio's investment in MPET1&2 were not at arm's length and the terms of the investment were not no more favourable than if the parties were dealing at arm's length.

C. APRA's CONCERNS

53. As a result of the Investigation APRA is concerned that during the Relevant Period, Mr Macolino and/or Trio may have contravened section 55(1) of the SIS Act and Trio may have contravened sections 109(1) and/or 109(1A) of the SIS Act by:
 - (a) permitting and causing investments in the EFL, SRPH, PPARP and MPET 1 & 2;
 - (b) appointing WGI, SAM and MIAG as investment managers of certain pools maintained by Trio as trustee of the Superannuation Entities;
 - (c) failing to cause Trio to cease investments in the EFL and redeem the investments in the EFL on behalf of the Superannuation Entities;
 - (d) failing to cause Trio to cease investments in SRPH and redeem the investments in SRPH on behalf of the Superannuation Entities;
 - (e) failing to cause Trio to cease investments in PPARP and redeem the investments in PPARP on behalf of the PPPST; and
 - (f) failing to cause Trio to cease investments in MPET 1 & 2 and redeem investments in MPET 1 & 2 on behalf of the Superannuation Entities.
54. In particular, APRA is concerned about:
 - (a) the non-arm's length nature and terms of the investments which were not no more favourable than if the parties with whom Trio was dealing had been arm's length;
 - (b) the significant amount of funds of the Superannuation Entities and the PPPST being placed into the investments compared to total funds under management;
 - (c) the lack of independent due diligence or recommendation in respect of the investments or underlying funds or assets of the investment;
 - (d) the investment and liquidity risk associated with the investments;
 - (e) the lack of any adequate and credible information about the performance or valuation of the investments or relevant investment manager; and
 - (f) the lack of adequate monitoring by Trio of the investment including the underlying fund or investment that was ultimately entered into by the relevant investment manager.

D. ACKNOWLEDGMENT OF APRA'S CONCERNS

55. Mr Macolino acknowledges the concerns held by APRA referred to in paragraphs 53 and 54.
56. Mr Macolino accepts that he should have acted differently in relation to the matters the subject of APRA's concerns and regrets the consequences which arose from those matters. Mr Macolino also regrets the losses caused to members of the Superannuation Entities and the PPPST from the failure of investments in the related parties.

E. UNDERTAKINGS

57. Under section 262A of the SIS Act, Mr Macolino 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 Macolino will not at any time for a period of eight 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).
58. Mr Macolino agrees to provide reasonable assistance to APRA in connection with the Investigation and/or any Subsequent Investigation arising out of the facts and circumstances set out in this Enforceable Undertaking and/or other conduct associated with Trio. Such assistance may include, but is not limited to:
- (a) being available when required by APRA and/or any Inspector appointed by APRA in respect of the Investigation and/or any Subsequent Investigation to provide information or documents relevant to the Investigation and/or any Subsequent Investigation;
 - (b) providing APRA an affidavit for use in Court proceedings in relation to his role as a member of the Board of Trio, the role of other members of the Board of Trio and otherwise assist APRA in the Investigation and/or any Subsequent Investigation;
 - (c) providing any further affidavit for use in Court proceedings concerning his role as a member of the Board of Trio and the role of other members of the Board of Trio as is reasonably required by APRA;
 - (d) giving evidence for APRA in relation to the matters set out in any affidavit(s) and any information he provides to APRA or any other matters relating to his role as a member of the Board of Trio and the role of other members 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 and/or any Subsequent Investigation, substantially in accordance with affidavit(s); and
 - (e) conferring with APRA or any counsel briefed by APRA or solicitor instructed by APRA in relation to his affidavit(s) or in relation to his giving evidence in any proceedings APRA may commence.

Undertaking to complete training

59. Mr Macolino further undertakes that prior to seeking appointment to a position referred to in paragraph 57 he will complete a course or training, as reasonably required by APRA and to be approved in advance by APRA, relating to:
- (a) 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;
 - (b) best practice in managing investments and investment managers.

F. ACKNOWLEDGMENTS

60. Mr Macolino 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 Macolino voluntarily and he has had an entitlement and an opportunity to obtain legal advice in relation to his obligations under, and the effect of this Enforceable Undertaking;
 - (c) Mr Macolino 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) other than disqualification proceedings under section 126H of the SIS Act on the matters the subject of APRA's concerns, this Enforceable Undertaking does not affect APRA's power to take any other action arising from the conduct or any other conduct.
61. Mr Macolino 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.
62. Mr Macolino 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.
63. 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.
64. 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 Lorenzo Patrick Macolino:

.....
Lorenzo Patrick Macolino

In the presence of:

.....
[Signature of witness]

.....
[Print name of witness]

Accepted by a delegate of APRA:

.....
[Name of delegate] Louis Serret

In the presence of:

.....
[Signature of witness]

.....
[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.