

**Superannuation Industry (Supervision) Act 1993**  
**ENFORCEABLE UNDERTAKING - JOHN HARTE**

THIS UNDERTAKING IS GIVEN ON 4 July 2013

**BY:**

John Gerard Owen Harte  
Date of Birth: 21 February 1965  
C/- Povey Stirk, Level 1, 8 Gregory Terrace, Alice Springs NT 0870

**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**

**AAM** means Astarra Asset Management Pty Limited (In Liquidation) ACN 113 940 953 (formerly Absolute Alpha Pty Limited)

**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

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

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

**EMA** means EMA International Limited, an exempted limited liability company incorporated in the British Virgin Islands

**Federal Court** means the Federal Court of 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

**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

**Marq Capital** means Marq Capital Pty Ltd ACN 113 913 474, an authorised representative of WGI

**Marq Property** means Marq Property Pty Ltd ACN 121 576 163, the trustee of the MPT



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

**MPT** means Marq Property Trust, a property trust managed by Marq Capital

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

**PPST** 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 the tenure of Mr Harte as a director of Trio being from 16 January 2006 to 31 May 2008

**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)*

**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)

**Overarching Investment Policy and Charter** means the Overarching Investment Policy and Investment Committee Charter approved by the Board of Trio and effective from 22 March 2006

**Underlying Funds** means the offshore hedge funds into which the ASF invested via EMA, including the EFL


**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**

### **1. 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.

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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 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 126(H)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).
4. Under section 197 of the SIS Act, APRA may apply to the Federal Court for a civil penalty order in respect of a person who has contravened a civil penalty provision of the SIS Act.

#### **Trio**

5. Trio was the holder of an RSE Licence granted by APRA in 2006 and the former trustee of the Superannuation Entities and the PPPST.
6. 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.
7. On 16 June 2010, APRA removed Trio as Trustee of the Superannuation Entities. On 22 June 2010, Trio was placed into liquidation.
8. During the Relevant Period, Mr John Gerard Owen Harte held the positions of:
  - (a) Director; and
  - (b) Chairman of the Investment Committee;
 and was a responsible officer of Trio, then known as Astarra Capital Limited, within the meaning of section 10 of the SIS Act. Mr Harte resigned his positions on 31 May 2008.

#### **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 Harte 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 9: 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, constitutes a contravention of section 55(1) of the SIS Act.

### *Related party provisions*

12. Section 109 of the SIS Act prohibited Trio from making or maintaining investments unless:
  - (a) Trio dealt with another party to a 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).
13. Sections 109(1) and 109(1A) are civil penalty provisions as defined by section 193 of the SIS Act. Section 196 provides for civil penalty consequences of contravening or being involved in a contravention of sections 109(1) and 109(1A) of the SIS Act.
14. Under section 194 of the SIS Act, a person who is involved in a contravention of section 109 of the SIS Act, is taken to have contravened that provision.

## **II. INVESTMENTS**

### *The EFL & ASF*


15. The EFL was a company incorporated in Saint Lucia and operated as an offshore hedge fund. The ASF operated as an offshore fund of hedge funds. During the Relevant Period, the Superannuation Entities' direct and indirect investments to the EFL increased from approximately \$25 million to \$39 million and in the ASF it increased from approximately \$10 million to \$26 million.
16. As at 30 September 2009 the value of the Superannuation Entities' investments in the ASF was approximately \$62.2 million. This included investments into the EFL, which were transferred into the ASF by Trio in June 2009.
17. 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.
18. ACT Super 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.

### *SRPH*

19. SRPH was involved in developing residential property through subsidiary entities. The Superannuation Entities collectively owned approximately 90% of the shares in SRPH.
20. During the Relevant Period, the Superannuation Entities increased their investments into the SRPH from approximately \$15 million to \$19 million.
21. On 26 August 2010 a liquidator was appointed to SRPH. ACT Super have been unable to redeem any of its investments in the SRPH on behalf of the Superannuation Entities.

### *The PPPST & PPARP*

22. PPARP was an offshore private foreign mutual fund to which the PPPST was the largest investor.
23. During the Relevant Period, \$2.2 million was invested into the PPARP bringing its total investment to be approximately \$51.2 million.
24. In about July 2007 the PPPST ceased to be a pooled superannuation trust within the meaning of the SIS Act. Units in the PPPST were transferred to the ARP Growth Fund and the majority of unitholders in PPPST were issued units in the ARP Growth

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Fund. Trio has been unable to redeem the investments into PPARP. The liquidator of Trio does not expect to recover assets of the PPARP from the ARP Growth Fund.

**The PPPST & MPT**

25. The MPT was an unlisted property trust related to the SRPH.
26. During the Relevant Period, the PPPST made a single investment of \$5.5 million into the MPT.
27. In July 2007, the units in the MPT were transferred to the ARP Growth Fund. The liquidator of Trio has been unable to recover any funds in the MPT and the investment has been lost.

**III. NON-ARM'S LENGTH ARRANGEMENTS**

**Trio**

28. Trio's directors included:
  - (a) Mr Cameron Anderson from 5 November 2003 to 15 November 2005;
  - (b) Mr Michael Anderson from 24 February 2005 to 12 October 2005;
  - (c) Mr David Guy Millhouse from 5 November 2003 to 12 October 2005;
  - (d) Mr Harte during the Relevant Period; and
  - (e) Mr Shawn Darrell Richard from 5 November 2003 to 15 November 2005.
29. Trio's immediate holding company was AFM. Mr Richard was also a director of AFM from 5 November 2003 to 24 April 2007. Mr Jack Flader (a US citizen and associate of Mr Richard not resident in Australia) was a director from 16 December 2004 until 8 August 2005. Mr Millhouse was also a director from 5 November 2003 to 25 October 2006. Mr Cameron Anderson was also a director of AFM from 5 November 2003 to 20 April 2006.
30. 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.
31. Trio appointed WGI as an investment manager. Mr Richard was a director of WGI from 12 July 2001 to 16 September 2009. WGI was placed into liquidation on 2 August 2011.

**The EFL & ASF**

32. Trio's investment in the EFL was not at arm's length and the terms of the investments were not no more favourable than if the parties were dealing at arm's length. EFL appointed GFML as its investment manager. GFML delegated its duties in relation to Australian investors to WGI.
33. Mr Carl Meerveld, an associate of Mr Flader, was a director of the EFL.
34. Trio's investment in the ASF was 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. AAM was appointed by Trio as investment manager of the ASF and acted as an authorised representative of WGI. Mr Richard was a director of AAM from 22 April 2004. AFM employed the key personnel of the ASF.

35. Further, EMA was established by Mr Richard and Mr Flader for the sole purpose of investing ASF funds into offshore hedge funds. Mr Marc Boudreau, an associate of Mr Richard, was a director of EMA.

#### **SRPH**

36. Trio's investment in SRPH was 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. Mr Cameron Anderson, Mr Michael Anderson and Mr Richard were directors of SRPH from 17 November 2004 to 26 March 2009.
37. Trio appointed WGI as the investment manager for SRPH. SAM was appointed as authorised representative of WGI for the purpose of undertaking investments by Trio into SRPH. 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.
38. Mr Cameron Anderson and Mr Michael Anderson were also directors of various subsidiary project companies of SRPH.

#### **PPARP**

39. Trio's investment in the PPARP was 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 was administered by PSTM, the authorised representative of WGI, the investment manager of the PPPST.
40. 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.
41. In relation to the ARP Growth Fund, PSTM acted as the investment manager of the ARP Growth Fund and was appointed by WGI as its authorised representative.

#### **MPT**

42. Trio's investment in the MPT was 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. Marq Capital was a related entity to Marq Property, the trustee of MPT. Mr Cameron Anderson and Mr Michael Anderson were directors of Marq Capital from 29 April 2005.
43. WGI appointed Marq Capital as its authorised representative for the purpose of accepting PPPST investments into the MPT.

#### **C. APRA's CONCERNS**

44. As a result of the investigation APRA is concerned that during the Relevant Period Mr Harte and/or Trio may have contravened section 55(1) of the SIS Act and Mr Harte may have been involved in Trio's contravention of sections 109(1) and/or 109(1A) of the SIS Act by:
- (a) failing to cause Trio to cease investments in the EFL and redeem Trio's investments in the EFL;
  - (b) failing to cause Trio to cease investments in the SRPH and redeem the investments of Trio in SRPH;
  - (c) failing to cause Trio to cease investments in the PPARP and redeem the investments of Trio in PPARP;

- (d) permitting investments by the Superannuation Entities in the ASF and failing to cease or redeem those investments; and
- (e) permitting the investment by PPPST in MPT and failing to redeem that investment.

45. In particular, APRA is concerned about:

- (a) Mr Harte's role as chairman of the Trio Investment Committee during the Relevant Period, including a failure to adequately conduct due diligence on related party investment managers;
- (b) the non-arm's length nature of the investments;
- (c) the significant amount of funds of the Superannuation Entities and the PPPST being placed into the investments compared to total funds under management;
- (d) the lack of independent due diligence or recommendation in respect of the investment or underlying fund or asset of the investment;
- (e) the investment and liquidity risk associated with the investment;
- (f) the lack of any adequate and credible information about the performance or valuation of the investment or relevant investment manager;
- (g) 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; and
- (h) the failure by Trio to comply with the Overarching Investment Policy and Charter, in particular the provisions relating to hedge fund investments and investments with related parties.

#### D. ACKNOWLEDGMENT OF APRA'S CONCERNS

46. Mr Harte acknowledges the concerns held by APRA referred to in paragraphs 44 to 45.
47. Mr Harte 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 paragraphs 44 and 45 above. Mr Harte regrets the matters giving rise to APRA's concerns and the consequences which arose from those matters. Mr Harte also regrets the losses caused to members of the Superannuation Entities and PPPST from the failure of the investments in the related parties. Since Mr Harte's resignation from the board of Trio on 31 May 2008, he has not been or acted 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).

#### E. UNDERTAKINGS

48. Under section 262A of the SIS Act, Mr Harte has offered and APRA has agreed to accept, as an alternative to APRA exercising its powers to apply to the Federal Court under section 126H(1) of the SIS Act for a disqualification order and under section 197 of the SIS Act for a civil penalty order, undertakings that Mr Harte will not at any time for a period of four 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).
49. Mr Harte further undertakes that prior to seeking appointment to a position referred to in paragraph 48 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**

50. Mr Harte 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 Harte voluntarily and he has obtained legal advice in relation to his obligations under, and the effect of, this Enforceable Undertaking;
- (c) 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(1) of the SIS Act or civil penalty proceedings under section 197 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.

51. Mr Harte 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](http://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.

52. Mr Harte 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.

53. 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.

54. 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 John Gerard Owen Harbo:

John G. O Harbo

John Gerard Owen Harbo

In the presence of:

Helen Peace

[Signature of witness]

Helen Peace

[Print name of witness]

Accepted by a delegate of APRA:

Louis SEERET  
Name of delegate: Louis SEERET  
In the presence of:

C. A. Sheehan

[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.