

**Superannuation Industry (Supervision) Act 1993**  
**ENFORCEABLE UNDERTAKING - DAVID GUY MILLHOUSE**

THIS UNDERTAKING IS GIVEN ON 29 October 2013

**BY:**

David Guy Millhouse  
c/- Nick Stretch Legal  
Suite 802, 530 Little Collins Street  
Melbourne VIC 3000  
Date of birth: 06/06/1951

**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

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

**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 Millhouse Private Equity Trust No 1

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

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

**Federal Court** means the Federal Court of Australia

**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

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

**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 (now the ARP Sub-Trust No1), a pooled superannuation trust registered under the SIS Act

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

**Relevant Period** means the tenure of Mr Millhouse as a director of Trio being from 5 November 2003 to 12 October 2005

**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)

**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.
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 that person :
  - (a) 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. During the Relevant Period, Mr Millhouse held the position of director and was a responsible officer of Trio within the meaning of section 10 of the SIS Act. Mr Millhouse was also a member of the investment committee of Trio from 29 January 2004 to 12 October 2005. Mr Millhouse resigned from his positions as a director and member of the investment committee of Trio on 12 October 2005.
5. Trio was the holder of an RSE Licence 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.

### *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 Millhouse 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 the other parties to the transaction at arm's length: section 109(1)(a); or
  - (b) if another party was not at arm's length, Trio dealt with the other party on terms that were no more favourable to the other party than if the parties were dealing at arm's length: section 109(1)(b) and 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 \$22 million. Further investments in the EFL were made on behalf of the Superannuation Entities after the Relevant Period.
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 that invested in offshore hedge funds, including the EFL.
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 \$9.3 million into SRPH. Further investments into SRPH were made on behalf of the Superannuation Entities after the Relevant Period
21. On 26 August 2010 a liquidator was appointed to SRPH. ACT Super have been unable to redeem 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 \$44.8 million was invested into the PPARP by the PPPST. Further investments in the PPARP were made on behalf of the PPPST after the Relevant Period
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 \$9.6 million in the MPET1&2. Further investments in the MPET 1 & 2 were made on behalf of the Superannuation Entities after the Relevant Period.
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 Superannuation Entities' investments in MPET1&2 have not been recovered to date.

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

#### **Trio**

32. Trio's directors included:
  - (a) Mr Millhouse during the Relevant Period;
  - (b) Mr Cameron Anderson from 5 November 2003 to 15 November 2005;
  - (c) Mr Matthew Littauer from 5 November 2003 to 2 December 2004;
  - (d) Mr Terrence Hallinan from 5 November 2003 to 17 December 2004;
  - (e) Mr Lorenzo Patrick Macolino from 5 November 2003 to 17 December 2004;
  - (f) Mr Shawn Darrell Richard from 5 November 2003 to 15 November 2005;
  - (g) Mr Michael Grace from 5 November 2003 to 17 December 2004;
  - (h) Mr Robert Horgan from 17 December 2004 to 9 March 2005; and
  - (i) Mr Michael Anderson from 24 March 2005 to 12 October 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 in St Lucia 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. Mr

Richard was a director of WGI and the company secretary of WGI from 12 July 2001 to 16 September 2009. Mr Littauer was a director of WGI from 12 July 2001 to 3 December 2004. Mr Horgan was a director of WGI from 1 January 2004 to September 2005. 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. Mr Cameron Anderson, Mr Michael Anderson and Mr Richard were directors of SAM from 15 March 2004 until it entered liquidation. Mr Hallinan was also a director of SAM from 18 November 2004 to 31 December 2004. 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, Fixed Interest Pool and Australian Equities Pool. Mr Millhouse, Mr Macolino and Mr Grace were directors of MIAG during the Relevant Period. MIAG was placed into liquidation on 11 June 2010.

#### *The EFL*

38. 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.
39. EFL appointed GFML as its investment manager. GFML delegated its duties in relation to Australian investors to WGI.
40. 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.

#### *SRPH*

41. 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.
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 SRPH from 17 November 2004 to 26 March 2009.
44. Mr Cameron Anderson, Mr Michael Anderson and Mr Hallinan were also directors of various subsidiary project companies of SRPH.

#### *PPARP*

45. 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.
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 Empyrean which was the fund manager of PPARP, and was also a responsible officer of WGI.

## **MPET1&2**

49. Trio's investments 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.
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.
51. Mr Cameron Anderson, Mr Michael Anderson, Mr Millhouse, Mr Hallinan, Mr Richard and Mr Macolino 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.

## **C. APRA'S CONCERNS**

52. As a result of the Investigation APRA is concerned that during the Relevant Period, Mr Millhouse 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.
53. In particular, APRA is concerned about:
  - (a) the non-arm's length nature and terms of the investments which were not no more favourable to other parties to the investments 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 investments;
  - (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 investments including the underlying fund or investment that was ultimately entered into by the relevant investment manager.



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

54. Mr Millhouse acknowledges the concerns held by APRA referred to in paragraphs 52 and 53.
55. Mr Millhouse 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 and regrets the consequences which arose from those matters. Mr Millhouse also regrets the losses caused to members of the Superannuation Entities and PPPST from the failure of the non-arm's length investments the subject of APRA's concerns.

#### **E. UNDERTAKINGS**

56. Under section 262A of the SIS Act, Mr Millhouse has offered and APRA has agreed to accept, as an alternative to APRA exercising its regulatory powers to apply to the Federal Court under section 126H(1) of the SIS Act for a disqualification order, undertakings that Mr Millhouse will not at any time for a period of 10 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 anybody corporate that is a trustee, investment manager or custodian of a registrable superannuation entity (as defined under the SIS Act).

#### **Undertaking to complete training**

57. Mr Millhouse further undertakes that after the period set out in paragraph 56 above expires and prior to seeking or accepting appointment to a position referred to in that paragraph 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**

58. Mr Millhouse 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 Millhouse 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 any other conduct; and
  - (d) other than disqualification proceedings under section 126H(1) 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.

59. Mr Millhouse 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.

60. Mr Millhouse 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.

61. 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.

62. 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 David Guy Millhouse:

  
.....

David Millhouse

In the presence of:

  
.....

[Signature of witness]

ADDIANS GURZMAN  
.....

[Print name of witness]

Accepted by a delegate of APRA:

  
.....

[Name of delegate] Warren Scott

In the presence of:

  
.....

[Signature of witness]

Ben Carruthers  
.....

[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.