



ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001

Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

DAVID RONALD ANDREWS

Address known to ASIC

1. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

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

AFM means Astarra Funds Management Pty Limited ACN 098 220 467;

Andrews means David Ronald Andrews;

APRA means the Australian Prudential Regulation Authority;

ASF means Astarra Strategic Fund ARSN 115 962 368;

ASIC means Australian Securities and Investments Commission;

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth);

Atlantis Fund means Atlantis Capital Markets Cayman LDC;

Corporations Act means *Corporations Act 2001* (Cth)

DPA means deferred purchase agreement;

EMA means EMA International Limited;

Exploration Fund means Exploration Fund Limited;

GCSL means Global Consultants and Services Limited;

MIS means managed investment scheme;

Pacific Fund means Pacific Capital Markets Cayman LDC;

Responsible Entity has the meaning set out in section 9 of the Corporations Act;

Richard means Shawn Darrell Richard;

SBS Fund means SBS Dynamic Opportunities Fund;

Sierra Fund means Sierra Multi Strategy Fund;

Tailwind Fund means Tailwind Investment Fund;

Trio means Trio Capital Limited (formerly Astarra Capital Limited) ACN 001 277 256;

WGAM means Wright Global Asset Management Pty Ltd;

2. ASIC's role

2.1 ASIC is charged under section 1 of the ASIC Act with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

3. Trio's business and Andrews' role

3.1 Trio (formerly Astarra Capital Limited) carried on a business managing funds for a number of MTSs and superannuation entities.

3.2 Trio was the holder of an Australian Financial Services Licence (AFSL) issued by ASIC which authorised it to operate, as responsible entity, managed investment schemes registered under the Corporations Act. It also held a Registrable Superannuation Entity Licence issued by APRA in relation to its activities as a trustee of superannuation entities.

3.3 Andrews was:

- (a) a non-executive director of Trio from 15 November 2005 to 15 January 2006 and from 13 July 2006 onwards;
- (b) chairman of the board of Trio from 28 February 2007;
- (c) a member of the investment committee of Trio in December 2005 and from 19 July 2006 onwards;
- (d) chairman of the investment committee of Trio on 14 December 2005 and from 30 July 2008 onwards;
- (e) a member of the risk and compliance committee of Trio from 26 July 2006 onwards; and
- (f) chairman of the risk and compliance committee of Trio from 4 December 2007 to 10 June 2008 and on 4 December 2008.

3.4 The MISs operated by Trio included the ASF which is referred to further in Section 5 below.

4. Other relevant parties

4.1 AFM was the parent company of Trio. AFM provided premises and staff to Trio and was a corporate authorised representative of Trio and provided administration services in that capacity.

4.2 In November 2003 WGAM, a company controlled by Richard, acquired all the shares in AFM. A new board of directors was appointed to Trio, including Richard, who was also appointed company secretary.

4.3 Richard subsequently held the following positions within the Trio business:

(a) director and secretary of Trio from 5 November 2003 to 15 November 2005;

(b) member of Trio's Investment Committee from:

(i) February 2004 until December 2005; and

(ii) December 2008 to August 2009;

(c) director and secretary of AFM from 5 November 2003 to 24 April 2007;

(d) director of WGAM from:

(i) 5 August 2003 to 22 October 2009; and

(ii) 17 December 2009 to 19 January 2011;

(e) secretary of WGAM from 5 August 2003 to 19 January 2011.

4.4 AAM was the investment manager for the ASF. The directors of AAM were Richard and Eugene Liu.

5. The ASF

5.1 The ASF (previously known as the Alpha Strategic Fund) was one of the managed investment schemes for which Trio acted as responsible entity.

5.2 The ASF was established in 2005 and AAM was appointed by Trio as the investment manager on 26 August 2005. According to the terms of the investment management agreement, AAM was appointed as Trio's agent and investment manager and was required, among other things, to:

- (a) invest and manage all property of the ASF, including identifying investment opportunities in the hedge fund market within the investment guidelines set out in the ASF's product disclosure statement; and
- (b) provide Trio with regular reports in writing.

5.3 The ASF invested the majority of its funds in:

- (a) purported direct investments in units in the Exploration Fund, a hedge fund registered in St. Lucia; and
- (b) purported investments through a DPA structure which purported to provide exposure to a number of overseas hedge funds including:
 - (i) the Exploration Fund;
 - (ii) the Atlantis Fund, registered in the Cayman Islands;
 - (iii) the Pacific Fund, registered in the Cayman Islands;
 - (iv) the Sierra Fund, registered in Anguilla;
 - (v) the SBS Fund, registered in the Cayman Islands; and
 - (vi) the Tailwind Fund, registered in the Cayman Islands (collectively the Underlying Funds).

5.4 A number of individuals who controlled or were associated with the Underlying Funds:

- (a) had previously held roles with Trio and its parent companies WGAM and AFM; and/or
- (b) were associated with Richard; and/or
- (c) were associated with or held roles with EMA and GCSL, which are referred to further in Section 6 below.

6. The DPA Structure

- 6.1 Under the DPA structure the ASF used investor funds to acquire contractual rights from EMA, a company incorporated in the British Virgin Islands. Those rights required EMA to, in the future, deliver to the ASF certain "Delivery Parcels", the value of which related to the performance of units in the Underlying Funds purportedly purchased by EMA.
- 6.2 EMA appointed GCSL to administer EMA's operations under the DPAs.

- 6.3 AAM, EMA and GCSL provided valuations to Trio for the investments made by the ASF through the DPA structure and Trio used these valuations as the basis for setting the unit prices for the ASF. Trio accepted the valuations received from these entities at face value, despite there being no market for the rights acquired by the ASF under the DPA structure, and no other means of readily ascertaining the value of these rights.
- 6.4 Further, the DPA structure did not provide AAM as investment manager of the ASF, Trio as responsible entity of the ASF or the custodian appointed by Trio any legal or beneficial interest in any units in the Underlying Funds which may have been purchased by EMA with funds provided by the ASF.
- 6.5 The ASF's investments in the Underlying Funds were last valued by EMA in September 2009 at \$125.8 million.

7. ASIC's investigation

- 7.1 On 2 October 2009 ASIC commenced an investigation into the conduct of Trio's officers in relation to suspected contraventions of section 601FD of the Corporations Act.
- 7.2 On 16 October 2009, ASIC issued an interim stop order on Trio preventing offers, issues, sales or transfers of interests in the ASF and certain other MISs for which Trio was the responsible entity.
- 7.3 On 16 December 2009 Trio was placed into voluntary administration and APRA suspended Trio as trustee of the superannuation funds.
- 7.4 On 17 December 2009 ASIC suspended Trio's AFSL but allowed the licence to continue for certain limited purposes.
- 7.5 The ASF was wound up on just and equitable grounds on 19 March 2010.
- 7.6 Trio went into liquidation on 22 June 2010.
- 7.7 Trio's liquidators have been unable to determine whether the investments in the Underlying Funds, which were purportedly valued at \$125.8 million, exist.

8. ASIC's concerns.

8.1 As a result of its investigation, ASIC identified issues of concern about whether Trio's officers had discharged their duties as officers of a responsible entity.

8.2 Section 601FD of the Corporations Act sets out various duties for officers of a responsible entity of a MIS. These duties include the following:

(a) to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complied with:

(i) the Corporations Act;

(ii) the constitution of the MIS;

(iii) the compliance plan of the MIS,

under section 601FD(1)(f)(i), (iii) and (iv) of the Corporations Act;

(b) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position under section 601FD(1)(b) of the Corporations Act; and

(c) to act in the best interests of the members of the MIS, and if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests under section 601FD(1)(c) of the Corporations Act.

8.3 Trio had a fiduciary and statutory responsibility to maintain independence while acting in its capacity as a responsible entity. The officers of Trio had a fiduciary and statutory responsibility to maintain independence while acting in their capacity as officers of the responsible entity. Any investments by Trio in funds controlled or operated by Trio's former directors, senior management team and associated entities and individuals would create potential conflicts of interests.

Specific issues

8.4 In his role as an officer of Trio, Andrews:

(a) was not aware of the methodology which formed the basis of the valuations of the ASF and made no enquiries to ascertain the methodology;

(b) did not ask for independent valuations to be undertaken for the ASF;

- (c) made no inquiries in relation to whether the unit price reports complied with relevant provisions of the ASF's constitution and compliance plans;
- (d) did not conduct any due diligence, monitoring or supervision of agents and external service providers to the ASF.

8.5 Further:

- (a) In 2006 and 2007, Trio's Investment Committee raised concerns with Trio's Board in relation to investments in the Exploration Fund. These concerns included the lack of reporting and the provision of information in general by the Exploration Fund. Mr Andrews was present at most of these meetings. These concerns were also recorded in both the Investment Committee and Board meeting minutes which were available to Andrews.
- (b) From late 2008 and throughout 2009, Andrews became aware that there were significant concerns about the ASF and the Underlying Funds. These concerns included:
 - (i) a failure by the Exploration Fund to satisfy redemption requests in a timely manner or at all, giving rise to liquidity issues with the Exploration Fund; and
 - (ii) delays and failures by AAM to obtain significant information from the Underlying Funds, including information about the existence of the assets of the Underlying Funds.
- (c) On 24 June 2009, Trio's board approved the Investment Committee's recommendation for a \$50 million in specie transfer of Exploration Fund Units to the ASF. The effect of this transaction was as follows:
 - (i) various superannuation entities of which Trio was the trustee transferred units they held in the Exploration Fund to the ASF;
 - (ii) in return those superannuation entities were issued units in the ASF corresponding to the notional value of the Exploration Fund units;
 - (iii) the ASF's exposure to the Exploration Fund was significantly increased; and
 - (iv) existing ASF members prior to the transaction had their interests in the other assets of the ASF significantly diluted.

Andrews introduced and endorsed the Investment Committee's recommendation to the Trio board notwithstanding that:

- (v) he was aware of liquidity problems with the Exploration Fund and concerns about the lack of information being provided by the Exploration Fund;
- (vi) no independent valuation was obtained for the Exploration Fund units; and
- (vii) no due diligence inquiries had been made about why the transaction was necessary.

Valuation obligations

8:6 Under section 601FD(1)(f)(i), (iii) and (iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio:

- (a) complied with section 601FC(1)(j) of the Corporations Act by ensuring that the ASF property was valued at regular intervals appropriate to the nature of the property;
- (b) complied with Chapter 2M of the Corporations Act, and in particular sections 296(1) and 297, in relation to the valuation of the ASF property;
- (c) complied with the ASF 2005 Constitution or the ASF 2008 Constitution as applicable, and in particular clause 8.3, which required that, in circumstances in which there was no readily ascertainable market value for assets of the ASF, the valuation methods used for those assets must be capable of calculating an issue price and an exit price for units in the ASF that was independently verifiable; and
- (d) complied with the Compliance Plan of the ASF during the relevant period which required that independent valuations of the ASF property in accordance with the ASF Constitution and Chapter 2M of the Corporations Act be obtained and that reports and information received from fund managers in relation to valuations be reviewed and any irregularities be rectified.

8:7 Trio did not obtain or have available, nor did Andrews during his directorship take any adequate steps to ensure that Trio did obtain or have available:

- (a) any report which dealt with whether there were ascertainable market values for rights under the DPAs and units in the Exploration Fund;

- (b) any valuation methodologies or guidelines for valuing rights under the DPAs and units in the Exploration Fund;
- (c) any independent valuations of the ASF scheme property;
- (d) any independent valuations of the ASF scheme property which would satisfy the requirements of the Corporations Act, the ASF Constitution and/or the ASF Compliance Plans.

8.8 In ASIC's view, a reasonable person in the position of Andrews would have taken steps to:

- (a) determine whether there was a readily ascertainable market value for the property of the ASF;
- (b) review, or cause to be established, valuation methodologies or guidelines for valuing the property of the ASF that would comply with the valuation requirements of the Corporations Act, clause 8.3 of the ASF's Constitution and ASF's Compliance Plans as applicable;
- (c) review or obtain independent valuations of the ASF;
- (d) remedy any inadequacies or defects revealed by the valuations or absence thereof; and
- (e) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (d) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.9 ASIC is concerned that Andrews contravened s601FD(1)(f)(i), (iii) and (iv) of the Corporations Act by failing to take the steps set out in paragraph 8.8 thereby failing to take steps to ensure that Trio complied with the Corporations Act, the ASF's Constitution and the ASF's Compliance Plans.

Unit Pricing obligations

- 8.10 Under section 601FD(1)(f)(iii) and (iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with:
- (a) its obligations under the ASF's Constitution in relation to unit pricing, and in particular clauses 5.23, 6.15 and 8.3 which required unit prices to be based on valuations and to be independently verifiable; and
 - (b) the provisions of the ASF's Compliance Plans which required the Responsible Officer or CFO and Fund Accountant to ensure that unit prices were calculated in accordance with the Constitution and the Guide to Good Practice for Unit Pricing.
- 8.11 Trio did not obtain or have available, nor did Andrews during his directorship take any adequate steps to ensure that Trio did obtain or have available:
- (a) any independent valuations of the property of the ASF;
 - (b) any independent valuations of the ASF property which would satisfy the requirements of the Corporations Act, the ASF Constitution and/or the ASF Compliance Plans;
 - (c) any report setting out the unit price for the ASF, how it was calculated, the valuations upon which it was based and how the valuations and calculations complied with the requirements of clauses 5.23, 6.15 and 8.3 of the ASF Constitution and the requirements of the ASF Compliance Plans.
- 8.12 In ASIC's view, a reasonable person in the position of Andrews would have taken steps to:
- (a) review or obtain independent valuations of the property of the ASF;
 - (b) review or cause to be created a report setting out the unit price for the ASF, how it was calculated, the valuations upon which it was based and how the valuations and calculations complied with the requirements of clauses 5.23, 6.15 and 8.3 of the ASF Constitution and the requirements of the ASF Compliance Plans;
 - (c) remedy any inadequacies or defects revealed by such reports or valuations or absence thereof; and
 - (d) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (c) in the event the

reasonable person did not take any of these steps, including by reviewing relevant documents.

- 8.13 ASIC is concerned that Andrews contravened s601FD(1)(f)(iii) and (iv) of the Corporations Act by failing to take the steps set out in paragraph 8.12 thereby failing to take steps to ensure that Trio complied with the ASF Constitution and the ASF Compliance Plans.

Due diligence obligations

- 8.14 Under section 601FD(1)(f)(iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with the provisions of the ASF Compliance Plan in relation to due diligence, monitoring and supervision of agents, contractors or external service providers and their insurance.

- 8.15 The ASF's investment structure was set up and continued to operate without any due diligence or monitoring by Trio as required by the ASF Compliance Plan. Trio did not, nor did Andrews during his directorship take any adequate steps to ensure that Trio did:

- (a) obtain or have available any due diligence reports relating to AAM, its associates or the engagement of AAM as investment manager of the ASF;
- (b) obtain or have available any due diligence reports relating to EMA, its associates or EMA's entry into the Master DPA and Supplemental Agreements;
- (c) prepare or have available any report relating to the ongoing monitoring and supervision of AAM, in particular its performance as investment manager of the ASF;
- (d) prepare or have available any report relating to the ongoing monitoring and supervision of EMA, in particular its ability to perform its obligations under the Master DPA and Supplemental Agreements;
- (e) receive or have available the regular written reports required to be provided by AAM to Trio under its investment management agreement;
- (f) prepare or have available any report relating to the insurance of AAM and EMA in respect of obligations owed by each of them to the ASF.

- 8.16 In ASIC's view, a reasonable person in the position of Andrews would have taken steps to:
- (a) review or cause to be created due diligence reports relating to AAM, EMA, their associates and the agreements entered into by each of them relating to the ASF;
 - (b) review or take steps to be provided with regular reports from AAM which it was required to provide to Trio under its investment management agreement with Trio;
 - (c) review or take steps to obtain regular reports relating to the monitoring and supervision of AAM (in particular its performance as investment manager of the ASF) and EMA (in particular its performance of its obligations under the Master DPA and the Supplemental Agreements);
 - (d) review or take steps to obtain regular reports relating to the insurance of AAM and EMA in respect of obligations owed by each of them to the ASF;
 - (e) remedy any inadequacies or defects revealed by such reports or absence thereof; and
 - (f) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (e) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.17 ASIC is concerned that Andrews contravened s601FD(1)(f)(iv) of the Corporations Act by failing to take the steps set out in paragraph 8.16 thereby failing to take steps to ensure that Trio complied with the ASF Compliance Plan.

Due diligence of Underlying Fund Managers

8.18 Under section 601FD(1)(f)(iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with the provisions of the ASF Compliance Plan in relation to the selection and performance of funds managers, including to ensure that Trio's investment committee undertook a quarterly review and reported its findings to the board regularly.

8.19 Investments for the ASF were made without any due diligence or monitoring of fund managers selected by AAM as required by the ASF Compliance Plan. Trio did not, nor did Andrews during his directorship take any steps to ensure that Trio did:

- (a) obtain or have available any due diligence reports relating to AAM's selection of fund managers for the investments in the Underlying Funds;
- (b) obtain or have available any reports of the monitoring and supervision of fund managers for the investments in the Underlying Funds;
- (c) take steps, through the Investment Committee, to prepare or have available any written reports to the board concerning the committee's quarterly reviews of fund managers relevant to the ASF.

8.20 In ASIC's view, a reasonable person in the position of Andrews would have taken steps to:

- (a) review or take steps to obtain due diligence reports relating to AAM's choice of fund managers for the Underlying Funds;
- (b) review or take steps to obtain reports of the monitoring and supervision of the fund managers for the Underlying Funds;
- (c) review or take steps to provide written reports and information to the board concerning the Investment Committee's quarterly reviews of the performance of the fund managers relevant to the ASF;
- (d) remedy any inadequacies or defects revealed by such reports or absence thereof; and
- (e) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (d) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.21 ASIC is concerned that Andrews contravened s601FD(1)(f)(iv) of the Corporations Act by failing to take the steps set out in paragraph 8.20 thereby failing to take steps to ensure that Trio complied with the ASF Compliance Plan.

Obligation to exercise reasonable care and diligence and obligation to act in the best interests of members.

- 8.22 Under section 601FD(1)(b) of the Corporations Act, Trio's officers were required to exercise the degree of care and diligence that a reasonable person in the officer's position would exercise in relation to the functions and responsibilities of the responsible entity of the ASF.
- 8.23 Under section 601FD(1)(c) of the Corporations Act, Trio's officers were required to act in the best interests of the members of the ASF.
- 8.24 In ASIC's view, a reasonable person exercising care and diligence in the position of Andrews would:
- (a) have taken the steps set out in paragraphs 8.8, 8.12, 8.16 and 8.20;
 - (b) not have permitted transactions whereby the ASF's funds were invested under the DPAs when there was no or inadequate information as to:
 - (i) the valuation and value of the rights under the DPAs;
 - (ii) the fund managers of the Underlying Funds;
 - (iii) the likelihood that EMA would or could meet its obligations under the DPAs from its own assets or insurance;
 - (iv) the role and interests of AAM in relation to EMA and the Underlying Funds;
 - (c) not have permitted transactions, whether as an in-specie transfer or a transfer in return for payment, whereby the ASF acquired units in the Exploration Fund when:
 - (i) there was no or inadequate information as to the valuation and value of Exploration Fund units;
 - (ii) there was no or inadequate information as to the fund managers involved in the Exploration Fund;
 - (iii) there were known liquidity problems with the Exploration Fund.
- 8.25 In ASIC's view, the best interests of members of the ASF required an officer of Trio to take the steps set out in paragraph 8.24.
- 8.26 ASIC is concerned that Andrews contravened section 601FD(1)(b) and section 601FD(1)(c) of the Corporations Act by failing to take the steps

set out in paragraph 8.24 and thereby failed to exercise reasonable care and diligence and act in the best interests of ASF's members.

Conflicts of interest

8.27 ASIC is concerned that there were numerous and serious conflicts of interest in relation to the investments made by the ASF in the Underlying Funds through the DPA structure. ASIC is further concerned that there was little or no acknowledgement of Trio's responsibilities to address these conflicts and Andrews failed to identify, manage and control these conflicts of interest.

8.28 These conflicts arose from:

- (a) Richard's company AAM acting as ASF's investment manager between 26 August 2005 and 22 December 2009 in circumstances where:
 - (i) WGAM, a company controlled by Richard, acquired all the shares in AFM, the parent company of Trio, in 2003;
 - (ii) Richard was a director of Trio and a member of Trio's Investment Committee at the time AAM was appointed;
 - (iii) Richard was, at various times during AAM's engagement, a director of Trio's parent companies, AFM and WGAM, and a member of Trio's Investment Committee.
- (b) the ASF investing, through AAM, in Tailwind, one of the Underlying Funds, when AAM was also the investment manager for Tailwind;
- (c) the Underlying Funds being controlled by individuals who were either associated with Richard, had previously held roles with Trio or its parent companies, or held roles with EMA and GCSL;
- (d) Andrews' participation in setting up an informal investment committee for AAM in July 2009 whose members included Richard and Andrews.

9. Acknowledgement of concerns

9.1 Andrews acknowledges ASIC's concerns as set out in Section 8 and also acknowledges that Section 8 sets out what was required to discharge his responsibilities as an officer of Trio.

10. Undertakings

10.1 Under s93AA of the ASIC Act, Andrews has offered, and ASIC has agreed to accept as an alternative to pursuing court action seeking, *inter alia*, declarations under section 601FD of the Corporations Act, the following undertakings.

10.2 Andrews undertakes:

- (a) not to provide any financial services; and
- (b) not to take part in the management of any corporation, with the exception of Fountainhead Consultants Pty Ltd (ACN 105 730 603) (Fountainhead), a company which provides consultancy services, on the condition that:
 - (i) Fountainhead does not issue any additional securities, within the meaning of s92 of the Corporations Act to any person or entity other than Andrews; and
 - (ii) the scope of Fountainhead's activities does not change,

for a period of 9 years from the time of acceptance of this undertaking by ASIC.

10.3 Without in any way limiting the undertaking in paragraph 10.2(a) above, Andrews undertakes, for a period of 9 years from the time of the acceptance of this undertaking by ASIC, not to:

- (a) do any act or engage in any conduct as a representative of an Australian Financial Services Licensee;
- (b) hold himself out as a representative of an Australian Financial Services Licensee;
- (c) carry on a business in relation to financial products or financial services, within the meaning of section 761A of the Corporations Act, either directly or indirectly as a director, partner, manager, servant or agent;
- (d) hold out that he is in anyway authorised to provide a particular financial service or services or that he is in anyway authorised to provide financial services generally; and
- (e) apply to ASIC under section 913A of the Corporations Act for an Australian Financial Services Licence.

10.4 Andrews undertakes to provide all documents and information requested by ASIC from time to time for the purpose of assessing Andrews' compliance with the terms of this enforceable undertaking.

11. Acknowledgements

11.1 Andrews acknowledges that ASIC:

- (a) may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;
- (b) may from time to time publicly refer to this undertaking; and
- (c) will make this undertaking available for public inspection.

11.2 Further Andrews acknowledges that:

- (a) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
- (b) this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

11.3 Andrews acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of paragraphs 10.1 to 10.4.

11.4 Andrews acknowledges that this undertaking has no operative force until accepted by ASIC, and Andrews and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

David Ronald Andrews *29 July 2011*

Accepted by the Australian Securities and Investments Commission under s93AA of the ASIC Act by its duly authorised delegate:

Delegate of Australian Securities and Investments Commission

Dated *10 August, 2011*

THE UNIVERSITY OF CHICAGO

PHILOSOPHY DEPARTMENT

PHILOSOPHY 101

LECTURE NOTES

PLATO'S THEORY OF FORMS

THE DIVISION OF LABOUR

THE CITY AND THE SOUL

THE ALLEGORY OF THE CAVE

THE PHILOSOPHER-KING



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REX JOHN PHILLPOTT

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3.3 Phillipott's roles included:

(a) Chief Executive Officer, a director, secretary and a member of the Risk and Compliance Committee of Trio from October 2005 to 5 January 2010; and

(b) a director and secretary of Trio's parent entity AFM from 24 April 2007 to 5 January 2010.

3.4 The MISs operated by Trio included the ASF which is referred to further in Section 5 below,

4. Other relevant parties

- 4.1 AFM was the parent company of Trio. AFM provided premises and staff to Trio and was a corporate authorised representative of Trio and provided administration services in that capacity.
- 4.2 In November 2003 WGAM a company controlled by Richard acquired all the shares in AFM. A new board of directors was appointed to Trio, including Richard, who was also appointed company secretary.
- 4.3 Richard subsequently held the following positions within the Trio business:
- (a) director and secretary of Trio from 5 November 2003 to 15 November 2005;
 - (b) member of Trio's Investment Committee from:
 - (i) February 2004 until December 2005; and again
 - (ii) December 2008 to August 2009;
 - (c) director and secretary of AFM from 5 November 2003 to 24 April 2007;
 - (d) director of WGAM from:
 - (i) 5 August 2003 to 22 October 2009; and
 - (ii) 17 December 2009 to 19 January 2011;
 - (e) secretary of WGAM from 5 August 2003 to 19 January 2011.
- 4.4 AAM was the investment manager for the ASF. The directors of AAM were Richard and Eugene Liu.

5. The ASF

- 5.1 The ASF (previously known as the Alpha Strategic Fund) was one of the managed investment funds for which Trio acted as Responsible Entity.
- 5.2 The ASF was established in 2005 and AAM was appointed by Trio as the investment manager on 26 August 2005. According to the terms of the investment management agreement, AAM was appointed as Trio's agent and investment manager and was required, among other things, to:

- (a) invest and manage all property of the ASF, including identifying investment opportunities in the hedge fund market within the investment guidelines set out in the ASF's product disclosure statement; and
- (b) provide Trio with regular reports in writing.

5.3 The ASF invested the majority of its funds in:

- (a) purported direct investments in units in the Exploration Fund, a hedge fund registered in St Lucia; and
- (b) purported investments through a DPA structure which purported to provide exposure to a number of overseas hedge funds including:
 - (i) the Exploration Fund;
 - (ii) the Atlantis Fund, registered in the Cayman Islands;
 - (iii) the Pacific Fund, registered in the Cayman Islands;
 - (iv) the Sierra Fund, registered in Anguilla;
 - (v) the SBS Fund, registered in the Cayman Islands; and
 - (vi) the Tailwind Fund, registered in the Cayman Islands(collectively the Underlying Funds).

5.4 A number of individuals who controlled or were associated with the Underlying Funds:

- (a) had previously held roles with Trio and its parent companies WGAM and AFM; and/or
- (b) were associated with Richard; and/or
- (c) were associated with or held roles with EMA and GCSL, which are referred to further in Section 6 below.

6. The DPA Structure

6.1 Under the DPA structure the ASF used investor funds to acquire contractual rights from EMA, a company incorporated in the British Virgin Islands. Those rights required EMA to in the future deliver to the ASF certain "Delivery Parcels", the value of which related to the performance of units in the Underlying Funds purportedly purchased by EMA.

- 6.2 EMA in turn outsourced its functions to GCSL, a Hong Kong based company. GCSL was also the administrator for the majority of the Underlying Funds.
- 6.3 AAM, EMA and GCSL provided valuations to Trio for the investments made by the ASF through the DPA structure and Trio used these valuations as the basis for setting the unit prices for the ASF. Trio accepted the valuations received from these entities at face value, despite there being no market for the rights acquired by the ASF under the DPA structure, and no other means of readily ascertaining the value of these rights.
- 6.4 Further, the DPA structure did not provide AAM as investment manager of the ASF, Trio as Responsible Entity of the ASF or the custodian appointed by Trio any legal or beneficial interest in any units in the Underlying Funds which may have been purchased by EMA with funds provided by the ASF.
- 6.5 The ASF's investments in the Underlying Funds were last valued by EMA in September 2009 at \$125.8 million.

7. ASIC's investigation

- 7.1 On 2 October 2009 ASIC commenced an investigation into the conduct of Trio's officers in relation to suspected contraventions of section 601FD of the Corporations Act.
- 7.2 On 16 October 2009, ASIC issued an interim stop order on Trio preventing offers, issues, sales or transfers of interests in the ASF and certain other MISs for which Trio was the responsible entity.
- 7.3 On 16 December 2009 Trio was placed into voluntary administration and APRA suspended Trio as trustee of the superannuation funds.
- 7.4 On 17 December 2009 ASIC suspended Trio's AFSL but allowed the licence to continue for certain limited purposes.
- 7.5 The ASF was wound up on just and equitable grounds on 19 March 2010.
- 7.6 Trio went into liquidation on 22 June 2010.
- 7.7 Trio's liquidators:
 - (a) have been unable to determine whether the investments in the Underlying Funds, which were purportedly valued at \$125.8 million, exist; and
 - (b) do not expect to recover any of the investments.

8. ASIC's concerns

- 8.1 As a result of its investigation, ASIC identified issues of concern about whether Trio's officers had discharged their duties as officers of a responsible entity.
- 8.2 Section 601FD of the Corporations Act sets out various duties for officers of a responsible entity of a MIS. These duties include the following:
- (a) to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complied with:
 - (i) the Corporations Act;
 - (ii) the constitution of the MIS;
 - (iii) the compliance plan of the MIS,under section 601FD(1)(f)(i), (iii) and (iv) of the Corporations Act;
 - (b) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position under section 601FD(1)(b) of the Corporations Act; and
 - (c) to act in the best interests of the members of the MIS, and if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests under section 601FD(1)(c) of the Corporations Act.
- 8.3 Trio had a fiduciary and statutory responsibility to maintain independence while acting in its capacity as a responsible entity. The officers of Trio had a fiduciary and statutory responsibility to maintain independence while acting in their capacity as officers of the responsible entity. Any investments by Trio in funds controlled or operated by Trio's former directors, senior management team and associated entities and individuals would create potential conflicts of interests.

Specific issues

- 8.4 In his role as an officer of Trio, Phillipott:
- (a) had regular communications with Richard in relation to the operation of the ASF and the business of Trio generally;
 - (b) had regular communications with Richard and various employees of AAM in helping to effect the purported ASF investments in the Underlying Funds;

- (c) was responsible for sending instructions to Trio's custodian and, from 17 February 2009, executing the DPAs;
- (d) was aware of the terms of the DPAs and the existence of EMA and GCSL;
- (e) assisted in giving effect to the purported investments in the Underlying Funds initiated by AAM;
- (f) was aware of the names of the Underlying Funds the ASF had purportedly invested in;
- (g) was not aware of the methodology which formed the basis of the valuations and made no enquiries to ascertain the methodology;
- (h) did not ask for independent valuations to be undertaken for the ASF; and
- (i) made no inquiries in relation to whether the unit price reports complied with relevant provisions of the ASF's constitution and compliance plans.

8.5 Further:

- (a) In 2006 and 2007, Trio's Investment Committee raised concerns with Trio's Board in relation to investments in the Exploration Fund. These concerns included the lack of reporting and the provision of information in general by the Exploration Fund. These concerns were recorded in both the Investment Committee and Board meeting minutes which were available to Phillipott.
- (b) From late 2008 and throughout 2009 Phillipott became aware that there were significant concerns about the ASF and the Underlying Funds. These concerns included:
 - (i) a failure by the Exploration Fund to satisfy redemption requests in a timely manner or at all, giving rise to liquidity issues with the Exploration Fund; and
 - (ii) delays and failures by AAM to obtain significant information from the Underlying Funds, including information about the existence of the assets of the Underlying Funds.
- (c) In 2008 and 2009 Phillipott implemented, under directions from AAM and/or Richard and without the knowledge of the Board or Investment Committee, a series of transactions pursuant to which:
 - (i) the ARP Growth Fund, another MIS managed by Trio which was having difficulty redeeming its units in the

Exploration Fund, transferred its Exploration Fund units to the ASF; and

- (ii) in return ASF investors' funds were paid directly to the ARP Growth Fund,

notwithstanding that there were known liquidity issues with the Exploration Fund.

- (d) On 24 June 2009, Trio's board approved the Investment Committee's recommendation for a \$50 million in specie transfer of Exploration Fund Units to the ASF. The effect of this transaction was as follows:

- (i) various superannuation entities of which Trio was the trustee transferred units they held in the Exploration Fund to the ASF;
- (ii) in return those superannuation entities were issued units in the ASF corresponding to the notional value of the Exploration Fund units;
- (iii) the ASF's exposure to the Exploration Fund was significantly increased; and
- (iv) existing ASF members prior to the transaction had their interests in the other assets of the ASF significantly diluted.

Phillpott participated in the making of this decision and implementing the transaction notwithstanding that:

- (v) he was aware of liquidity problems with the Exploration Fund and concerns about the lack of information being provided by the Exploration Fund;
- (vi) no independent valuation was obtained for the Exploration Fund units; and
- (vii) no due diligence inquiries had been made about why the transaction was necessary.

Valuation obligations

8.6 Under section 601FD(1)(f)(i), (iii) and (iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio:

- (a) complied with section 601FC (1) (j) of the Corporations Act by ensuring that the ASF property was valued at regular intervals appropriate to the nature of the property;

- (b) complied with Chapter 2M of the Corporations Act, and in particular sections 296(1) and 297, in relation to the valuation of the ASF property;
- (c) complied with the ASF 2005 Constitution or the ASF 2008 Constitution as applicable, and in particular clause 8.3, which required that, in circumstances in which there was no readily ascertainable market value for assets of the ASF, the valuation methods used for those assets must be capable of calculating an issue price and an exit price for units in the ASF that was independently verifiable; and
- (d) complied with the Compliance Plan of the ASF during the relevant period which required that independent valuations of the ASF property in accordance with the ASF Constitution and Chapter 2M of the Corporations Act be obtained and that reports and information received from fund managers in relation to valuations be reviewed and any irregularities be rectified.

8.7 Trio did not obtain or have available, nor did Phillipott during his directorship take any steps to ensure that Trio did obtain or have available:

- (a) any report which dealt with whether there were ascertainable market values for rights under the DPAs and units in the Exploration Fund;
- (b) any valuation methodologies or guidelines for valuing rights under the DPAs and units in the Exploration Fund;
- (c) any independent valuations of the ASF scheme property;
- (d) any independent valuations of the ASF scheme property which would satisfy the requirements of the Corporations Act, the ASF Constitution and/or the ASF Compliance Plans.

8.8 In ASIC's view, a reasonable person in the position of Phillipott would have taken steps to:

- (a) determine whether there was a readily ascertainable market value for the property of the ASF;
- (b) review or cause to be established valuation methodologies or guidelines for valuing the property of the ASF that would comply with the valuation requirements of the Corporations Act, clause 8.3 of the ASF's Constitution and ASF's Compliance plans applicable;
- (c) review or obtain independent valuations of the ASF;

- (d) remedy any inadequacies or defects revealed by the valuations or absence thereof; and
- (e) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (d) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.9 ASIC is concerned that Phillpott contravened s601FD(1)(f)(i), (iii) and (iv) of the Corporations Act by failing to take the steps set out in paragraph 8.8 thereby failing to take steps to ensure that Trio complied with the Corporations Act, the ASF's Constitution and the ASF's Compliance Plans.

Unit Pricing obligations

- 8.10 Under section 601FD(1)(f)(iii) and (iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with:
- (a) its obligations under the ASF's Constitution in relation to unit pricing, and in particular clauses 5.23, 6.15 and 8.3 which required unit prices to be based on valuations and to be independently verifiable; and
 - (b) the provisions of the ASF's Compliance Plans which required the Responsible Officer or CFO and Fund Accountant to ensure that unit prices were calculated in accordance with the Constitution and the Guide to Good Practice for Unit Pricing.
- 8.11 Trio did not obtain or have available, nor did Phillpott during his directorship take any steps to ensure that Trio did obtain or have available:
- (a) any independent valuations of the property of the ASF;
 - (b) any independent valuations of the ASF property which would satisfy the requirements of the Corporations Act, the ASF Constitution and/or the ASF Compliance Plans;
 - (c) any report setting out the unit price for the ASF, how it was calculated, the valuations upon which it was based and how the valuations and calculations complied with the requirements of clauses 5.23, 6.15 and 8.3 of the ASF Constitution and the requirements of the ASF Compliance Plans.
- 8.12 In ASIC's view, a reasonable person in the position of Phillpott would have taken steps to:

- (a) review or obtain independent valuations of the property of the ASF;
- (b) review or cause to be created a report setting out the unit price for the ASF, how it was calculated, the valuations upon which it was based and how the valuations and calculations complied with the requirements of clauses 5.23, 6.15 and 8.3 of the ASF Constitution and the requirements of the ASF Compliance Plans;
- (c) remedy any inadequacies or defects revealed by such reports or valuations or absence thereof; and
- (d) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (c) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.13 ASIC is concerned that Phillpott contravened s601FD(1)(f)(iii) and (iv) of the Corporations Act by failing to take the steps set out in paragraph 8.12 thereby failing to take steps to ensure that Trio complied with the ASF Constitution and the ASF Compliance Plans.

Due diligence obligations

- 8.14 Under section 601FD(1)(f)(iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with the provisions of the ASF Compliance Plan in relation to due diligence, monitoring and supervision of agents, contractors or external service providers and their insurance.
- 8.15 The ASF's investment structure was set up and continued to operate without any due diligence or monitoring by Trio as required by the ASF Compliance Plan. Trio did not, nor did Phillpott during his directorship take any steps to ensure that Trio did:
- (a) obtain or have available any due diligence reports relating to AAM, its associates or the engagement of AAM as investment manager of the ASF;
 - (b) obtain or have available any due diligence reports relating to EMA, its associates or EMA's entry into the Master DPA and Supplemental Agreements;
 - (c) prepare or have available any report relating to the ongoing monitoring and supervision of AAM, in particular its performance as investment manager of the ASF;

- (d) prepare or have available any report relating to the ongoing monitoring and supervision of EMA, in particular its ability to perform its obligations under the Master DPA and Supplemental Agreements;
- (e) receive or have available the regular written reports required to be provided by AAM to Trio under its investment management agreement;
- (f) prepare or have available any report relating to the insurance of AAM and EMA in respect of obligations owed by each of them to the ASF;

8.16 In ASIC's view, a reasonable person in the position of Phillipott would have taken steps to:

- (a) review or cause to be created due diligence reports relating to AAM, EMA, their associates and the agreements entered into by each of them relating to the ASF;
- (b) review or take steps to be provided with regular reports from AAM which it was required to provide to Trio under its investment management agreement with Trio;
- (c) review or take steps to obtain regular reports relating to the monitoring and supervision of AAM (in particular its performance as investment manager of the ASF) and EMA (in particular its performance of its obligations under the Master DPA and the Supplemental Agreements);
- (d) review or take steps to obtain regular reports relating to the insurance of AAM and EMA in respect of obligations owed by each of them to the ASF;
- (e) remedy any inadequacies or defects revealed by such reports or absence thereof; and
- (f) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (e) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.17 ASIC is concerned that Phillipott contravened s601FD(1)(f)(iv) of the Corporations Act by failing to take the steps set out in paragraph 8.16 thereby failing to take steps to ensure that Trio complied with the ASF Compliance Plan.

Due diligence of Underlying Fund Managers

- 8.18 Under section 601FD(1)(f)(iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with the provisions of the ASF Compliance Plan in relation to the selection and performance of funds managers, including to ensure that Trio's investment committee undertook a quarterly review and reported its finding to the board regularly.
- 8.19 Investments for the ASF were made without any due diligence or monitoring of fund managers selected by AAM as required by the ASF Compliance Plan. Trio did not, nor did Phillipott during his directorship take any steps to ensure that Trio did:
- (a) obtain or have available any due diligence reports relating to AAM's selection of fund managers for the investments in the Underlying Funds;
 - (b) obtain or have available any reports of the monitoring and supervision of fund managers for the investments in the Underlying Funds;
 - (c) take steps, through the Investment Committee, to prepare or have available any written reports to the board concerning the committee's quarterly reviews of fund managers relevant to the ASF.
- 8.20 In ASIC's view, a reasonable person in the position of Phillipott would have taken steps to:
- (a) review or take steps to obtain due diligence reports relating to AAM's choice of fund managers for the Underlying Funds;
 - (b) review or take steps to obtain reports of the monitoring and supervision of the fund managers for the Underlying Funds;
 - (c) review or take steps to provide written reports and information to the board concerning the Investment Committee's quarterly reviews of the performance of the fund managers relevant to the ASF;
 - (d) remedy any inadequacies or defects revealed by such reports or absence thereof; and
 - (e) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (d) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.21 ASIC is concerned that Phillpott contravened s601FD(1)(f)(iv) of the Corporations Act by failing to take the steps set out in paragraph 8.20 thereby failing to take steps to ensure that Trio complied with the ASF Compliance Plan.

Obligation to exercise reasonable care and diligence and obligation to act in the best interests of members

8.22 Under section 601FD(1)(b) of the Corporations Act, Trio's officers were required to exercise the degree of care and diligence that a reasonable person in the officer's position would exercise in relation to the functions and responsibilities of the responsible entity of the ASF.

8.23 Under section 601FD(1)(c) of the Corporations Act, Trio's officers were required to act in the best interests of the members of the ASF.

8.24 In ASIC's view, a reasonable person exercising care and diligence in the position of Phillpott would:

- (a) have taken the steps set out in paragraphs 8.8, 8.12, 8.16 and 8.20;
- (b) not have permitted transactions whereby the ASF's funds were invested under the DPAs when there was no or inadequate information as to:
 - (i) the valuation and value of the rights under the DPAs;
 - (ii) the fund managers of the Underlying Funds;
 - (iii) the likelihood that EMA would or could meet its obligations under the DPAs from its own assets or insurance;
 - (iv) the role and interests of AAM in relation to EMA and the Underlying Funds;
- (c) not have permitted transactions, whether as an in specie transfer or a transfer in return for payment, whereby the ASF acquired units in the Exploration Fund when:
 - (i) there was no or inadequate information as to the valuation and value of Exploration Fund units;
 - (ii) there was no or inadequate information as to the fund managers involved in the Exploration Fund;
 - (iii) there were known liquidity problems with the Exploration Fund.

- 8.25 In ASIC's view, the best interests of members of the ASF required an officer of Trio to take the steps set out in paragraph 8.24.
- 8.26 ASIC is concerned that Phillipott contravened section 601FD(1)(b) and section 601FD(1)(c) of the Corporations Act by failing to take the steps set out in paragraph 8.24 and thereby failed to exercise reasonable care and diligence and act in the best interests of ASF's members.

Conflicts of interest

- 8.27 ASIC is concerned that there were numerous and serious conflicts of interest in relation to the investments made by the ASF in the Underlying Funds through the DPA structure. There was little or no acknowledgement of Trio's responsibilities to address these conflicts. Phillipott failed to identify, manage and control these conflicts of interest.
- 8.28 These conflicts arose from:
- (a) Richard's company AAM acting as ASF's investment manager between 26 August 2005 and 22 December 2009 in circumstances where:
 - (i) WGAM a company controlled by Richard acquired all the shares in AFM, the parent company of Trio, in 2003;
 - (ii) Richard was a director of Trio and a member of Trio's Investment Committee at the time AAM was appointed;
 - (iii) Richard was, at various times during AAM's engagement, a director of parent companies, AFM and WGAM, and a member of Trio's Investment Committee.
 - (b) the ASF investing, through AAM, in Tailwind, one of the Underlying Funds, when AAM was also the investment manager for Tailwind;
 - (c) the Underlying Funds being controlled by individuals who were either associated with Richard, had previously held roles with Trio or its parent companies, or held roles with EMA and GCSL.

9. Acknowledgement of concerns

- 9.1 Phillipott acknowledges ASIC's concerns as set out in Section 8 and also acknowledges that Section 8 sets out what was required to discharge his responsibilities as an officer of Trio.

10. Undertakings

- 10.1 Under s93AA of the ASIC Act, Phillpott has offered, and ASIC has agreed to accept as an alternative to pursuing court action seeking, inter alia, declarations under section 601FD of the Corporations Act, the following undertakings.
- 10.2 Phillpott undertakes:
- (a) not to provide any financial services; and
 - (b) not to take part in the management of any corporation,
- for a period of 15 years from the time of acceptance of this undertaking by ASIC.
- 10.3 Without in any way limiting the undertaking in paragraph 10.2(a) above, Phillpott undertakes, for a period of 15 years from the time of the acceptance of this undertaking by ASIC, not to:
- (a) do any act or engage in any conduct as a representative of an Australian Financial Services Licensee;
 - (b) hold himself out as a representative of an Australian Financial Services Licensee;
 - (c) carry on a business in relation to financial products or financial services, within the meaning of section 761A of the Corporations Act, either directly or indirectly as a director, partner, manager, servant or agent;
 - (d) hold out that he is in anyway authorised to provide a particular financial service or services or that he is in any way authorised to provide financial services generally; and
 - (e) apply to ASIC under section 913A of the Corporations Act for an Australian Financial Services Licence.
- 10.4 Phillpott undertakes to provide all documents and information requested by ASIC from time to time for the purpose of assessing Phillpott's compliance with the terms of this enforceable undertaking.

11. Acknowledgements

11.1 Phillipott acknowledges that ASIC:

- (a) may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;
- (b) may from time to time publicly refer to this undertaking; and
- (c) will make this undertaking available for public inspection.

11.2 Further Phillipott acknowledges that:

- (a) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
- (b) this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

11.3 Phillipott acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of paragraphs 10.1 to 10.4.

11.4 Phillipott acknowledges that this undertaking has no operative force until accepted by ASIC, and Phillipott and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

.....
Rex John Phillipott

Dated: 31st MAY 2011

Accepted by the Australian Securities and Investments Commission under s93AA of the ASIC Act by its duly authorised delegate:

.....
Delegate of Australian Securities and Investments Commission

Dated: 4 July 2011



ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001

Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

NATASHA BECK

Address known to ASIC

i. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

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

AFM means Astarra Funds Management Pty Limited ACN 098 220 467;

APRA means the Australian Prudential Regulation Authority;

ASF means Astarra Strategic Fund ARSN 115-962 368;

ASIC means Australian Securities and Investments Commission;

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth);

Atlantis Fund means Atlantis Capital Markets Cayman LDC;

Beck means Natasha Beck;

Corporations Act means *Corporations Act 2001* (Cth)

DPA means deferred purchase agreement;

EMA means EMA International Limited;

Exploration Fund means Exploration Fund Limited;

GCSL means Global Consultants and Services Limited;

MIS means managed investment scheme;

Pacific Fund means Pacific Capital Markets Cayman LDC;

Responsible Entity has the meaning set out in section 9 of the Corporations Act;

Richard means Shawn Darrell Richard;

SBS Fund means SBS Dynamic Opportunities Fund;

Sierra Fund means Sierra Multi Strategy Fund;

Tailwind Fund means Tailwind Investment Fund;

Trio means Trio Capital Limited (formerly Astarra Capital Limited) ACN 001 277 236;

WGAM means Wright Global Asset Management Pty Ltd;

2. ASIC's role

2.1 ASIC is charged under section 1 of the ASIC Act with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

3. Trio's business and Beck's role

3.1 Trio (formerly Astarra Capital Limited) carried on a business managing funds for a number of MISs and superannuation entities.

3.2 Trio was the holder of an Australian Financial Services Licence (AFSL) issued by ASIC which authorised it to operate, as Responsible Entity, managed investment schemes registered under the Corporations Act. It also held a Registrable Superannuation Entity Licence issued by APRA in relation to its activities as a trustee of superannuation entities.

3.3 Beck was:

(a) a non-executive director of Trio from 18 June 2008 to 17 December 2009; and

(b) a member of the investment committee of Trio from 5 August 2009 to 17 December 2009.

3.4 The MISs operated by Trio included the ASF which is referred to further in Section 5 below.

4. Other relevant parties

4.1 AFM was the parent company of Trio. AFM provided premises and staff to Trio and was a corporate authorised representative of Trio and provided administration services in that capacity.

4.2 In November 2003 WGAM a company controlled by Richard acquired all the shares in AFM. A new board of directors was appointed to Trio, including Richard, who was also appointed company secretary.

4.3 Richard subsequently held the following positions within the Trio business:

- (a) director and secretary of Trio from 5 November 2003 to 15 November 2005;
- (b) member of Trio's Investment Committee from:
 - (i) February 2004 until December 2005; and again
 - (ii) December 2008 to August 2009;
- (c) director and secretary of AFM from 5 November 2003 to 24 April 2007;
- (d) director of WGAM from:
 - (i) 5 August 2003 to 22 October 2009; and
 - (ii) 17 December 2009 to 19 January 2011;
- (e) secretary of WGAM from 5 August 2003 to 19 January 2011.

4.4 AAM was the investment manager for the ASF. The directors of AAM were Richard and Eugène Liu.

5. The ASF

5.1 The ASF (previously known as the Alpha Strategic Fund) was one of the managed investment funds for which Trio acted as Responsible Entity.

5.2 The ASF was established in 2005 and AAM was appointed by Trio as the investment manager on 26 August 2005. According to the terms of the investment management agreement, AAM was appointed as Trio's agent and investment manager and was required, among other things, to:

- (a) invest and manage all property of the ASF, including identifying investment opportunities in the hedge fund market within the investment guidelines set out in the ASF's product disclosure statement; and
- (b) provide Trio with regular reports in writing.

5.3 The ASF invested the majority of its funds in:

- (a) purported direct investments in units in the Exploration Fund, a hedge fund registered in St Lucia; and
- (b) purported investments through a DPA structure which purported to provide exposure to a number of overseas hedge funds including:
 - (i) the Exploration Fund;
 - (ii) the Atlantis Fund, registered in the Cayman Islands;
 - (iii) the Pacific Fund, registered in the Cayman Islands;
 - (iv) the Sierra Fund, registered in Anguilla;
 - (v) the SBS Fund, registered in the Cayman Islands; and
 - (vi) the Tailwind Fund, registered in the Cayman Islands
 (collectively the Underlying Funds).

5.4 A number of individuals who controlled or were associated with the Underlying Funds:

- (a) had previously held roles with Trio and its parent companies WGAM and AFM; and/or
- (b) were associated with Richard; and/or
- (c) were associated with or held roles with EMA and GCSL, which are referred to further in Section 6 below.

6. The DPA Structure

- 6.1 Under the DPA structure the ASF used investor funds to acquire contractual rights from EMA, a company incorporated in the British Virgin Islands. Those rights required EMA to in the future deliver to the ASF certain "Delivery Parcels", the value of which related to the performance of units in the Underlying Funds purportedly purchased by EMA.
- 6.2 EMA appointed GCSL to administer EMA's operations under the DPAs.
- 6.3 AAM, EMA and GCSL provided valuations to Trio for the investments made by the ASF through the DPA structure and Trio used these valuations as the basis for setting the unit prices for the ASF. Trio accepted the valuations received from these entities at face value, despite there being no market for the rights acquired by the ASF under the DPA structure, and no other means of readily ascertaining the value of these rights.

- 6.4 Further, the DPA structure did not provide AAM as investment manager of the ASF, Trio as Responsible Entity of the ASF or the custodian appointed by Trio any legal or beneficial interest in any units in the Underlying Funds which may have been purchased by EMA with funds provided by the ASF.
- 6.5 The ASF's investments in the Underlying Funds were last valued by EMA in September 2009 at \$125.8 million.

7. ASIC's investigation

- 7.1 On 2 October 2009 ASIC commenced an investigation into the conduct of Trio's officers in relation to suspected contraventions of section 601FD of the Corporations Act.
- 7.2 On 16 October 2009, ASIC issued an interim stop order on Trio preventing offers, issues, sales or transfers of interests in the ASF and certain other MISs for which Trio was the responsible entity.
- 7.3 On 16 December 2009 Trio was placed into voluntary administration and APRA suspended Trio as trustee of the superannuation funds.
- 7.4 On 17 December 2009 ASIC suspended Trio's AFSL but allowed the licence to continue for certain limited purposes.
- 7.5 The ASF was wound up on just and equitable grounds on 19 March 2010.
- 7.6 Trio went into liquidation on 22 June 2010.
- 7.7 Trio's liquidators have been unable to determine whether the investments in the Underlying Funds, which were purportedly valued at \$125.8 million, exist.

8. ASIC's concerns

- 8.1 As a result of its investigation, ASIC identified issues of concern about whether Trio's officers had discharged their duties as officers of a responsible entity.
- 8.2 Section 601FD of the Corporations Act sets out various duties for officers of a responsible entity of a MIS. These duties include the following:
- (a) to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complied with:
 - (i) the Corporations Act;
 - (ii) the constitution of the MIS;
 - (iii) the compliance plan of the MIS,under section 601FD(1)(f)(i), (iii) and (iv) of the Corporations Act;
 - (b) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position under section 601FD(1)(b) of the Corporations Act; and
 - (c) to act in the best interests of the members of the MIS, and if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests under section 601FD(1)(c) of the Corporations Act.
- 8.3 Trio had a fiduciary and statutory responsibility to maintain independence while acting in its capacity as a responsible entity. The officers of Trio had a fiduciary and statutory responsibility to maintain independence while acting in their capacity as officers of the responsible entity. Any investments by Trio in funds controlled or operated by Trio's former directors, senior management team and associated entities and individuals would create potential conflicts of interests.

Specific issues

- 8.4 In her role as an officer of Trio, Beck:
- (a) was not aware of the methodology which formed the basis of the valuations of the ASF and made no enquiries to ascertain the methodology;
 - (b) did not ask for independent valuations to be undertaken for the ASF;

- (c) made no inquiries in relation to whether the unit price reports complied with relevant provisions of the ASF's constitution and compliance plans;
- (d) did not conduct any due diligence, monitoring or supervision of agents and external service providers to the ASF.

8.5 Further:

- (a) In 2006 and 2007, Trio's Investment Committee raised concerns with Trio's Board in relation to investments in the Exploration Fund. These concerns included the lack of reporting and the provision of information in general by the Exploration Fund. These concerns were recorded in both the Investment Committee and Board meeting minutes which were available to Beck.
- (b) From late 2008 and throughout 2009 Beck became aware that there were significant concerns about the ASF and the Underlying Funds. These concerns included:
 - (i) a failure by the Exploration Fund to satisfy redemption requests in a timely manner or at all, giving rise to liquidity issues with the Exploration Fund; and
 - (ii) delays and failures by AAM to obtain significant information from the Underlying Funds, including from October 2009 information about the existence of the assets of the Underlying Funds.
- (c) On 24 June 2009, Trio's board approved the Investment Committee's recommendation for a \$50 million in specie transfer of Exploration Fund Units to the ASF. The effect of this transaction was as follows:
 - (i) various superannuation entities of which Trio was the trustee transferred units they held in the Exploration Fund to the ASF;
 - (ii) in return those superannuation entities were issued units in the ASF corresponding to the notional value of the Exploration Fund units;
 - (iii) the ASF's exposure to the Exploration Fund was significantly increased; and
 - (iv) existing ASF members prior to the transaction had their interests in the other assets of the ASF significantly diluted.

Beck participated in the making of this decision notwithstanding that:

- (v) she was aware of liquidity problems with the Exploration Fund and concerns about the lack of information being provided by the Exploration Fund;
- (vi) no independent valuation was obtained for the Exploration Fund units; and
- (vii) no due diligence inquiries had been made about why the transaction was necessary.

Valuation obligations

8.6 Under section 601FD(1)(f)(i), (iii) and (iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio:

- (a) complied with section 601FC(1)(j) of the Corporations Act by ensuring that the ASF property was valued at regular intervals appropriate to the nature of the property;
- (b) complied with Chapter 2M of the Corporations Act, and in particular sections 296(1) and 297, in relation to the valuation of the ASF property;
- (c) complied with the ASF 2005 Constitution or the ASF 2008 Constitution as applicable, and in particular clause 8.3, which required that, in circumstances in which there was no readily ascertainable market value for assets of the ASF, the valuation methods used for those assets must be capable of calculating an issue price and an exit price for units in the ASF that was independently verifiable; and
- (d) complied with the Compliance Plan of the ASF during the relevant period which required that independent valuations of the ASF property in accordance with the ASF Constitution and Chapter 2M of the Corporations Act be obtained and that reports and information received from fund managers in relation to valuations be reviewed and any irregularities be rectified.

8.7 Trio did not obtain or have available, nor did Beck during her directorship take any adequate steps to ensure that Trio did obtain or have available:

- (a) any report which dealt with whether there were ascertainable market values for rights under the DPAs and units in the Exploration Fund;
- (b) any valuation methodologies or guidelines for valuing rights under the DPAs and units in the Exploration Fund;

- (c) any independent valuations of the ASF scheme property;
- (d) any independent valuations of the ASF scheme property which would satisfy the requirements of the Corporations Act, the ASF Constitution and/or the ASF Compliance Plans.

8.8 In ASIC's view, a reasonable person in the position of Beck would have taken steps to:

- (a) determine whether there was a readily ascertainable market value for the property of the ASF;
- (b) review or cause to be established valuation methodologies or guidelines for valuing the property of the ASF that would comply with the valuation requirements of the Corporations Act, clause 8.3 of the ASF's Constitution and ASF's Compliance Plans as applicable;
- (c) review or obtain independent valuations of the ASF;
- (d) remedy any inadequacies or defects revealed by the valuations or absence thereof; and
- (e) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (d) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

8.9 ASIC is concerned that Beck contravened s601FD(1)(f)(i), (iii) and (iv) of the Corporations Act by failing to take the steps set out in paragraph 8.8 thereby failing to take steps to ensure that Trio complied with the Corporations Act, the ASF's Constitution and the ASF's Compliance Plans.

Unit Pricing obligations

- 8.10 Under section 601FD(1)(f)(iii) and (iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with:
- (a) its obligations under the ASF's Constitution in relation to unit pricing, and in particular clauses 5.23, 6.15 and 8.3 which required unit prices to be based on valuations and to be independently verifiable; and
 - (b) the provisions of the ASF's Compliance Plans which required the Responsible Officer or CFO and Fund Accountant to ensure that unit prices were calculated in accordance with the Constitution and the Guide to Good Practice for Unit Pricing.
- 8.11 Trio did not obtain or have available, nor did Beck during her directorship take any adequate steps to ensure that Trio did obtain or have available:
- (a) any independent valuations of the property of the ASF;
 - (b) any independent valuations of the ASF property which would satisfy the requirements of the Corporations Act, the ASF Constitution, and/or the ASF Compliance Plans;
 - (c) any report setting out the unit price for the ASF, how it was calculated, the valuations upon which it was based and how the valuations and calculations complied with the requirements of clauses 5.23, 6.15 and 8.3 of the ASF Constitution and the requirements of the ASF Compliance Plans.
- 8.12 In ASIC's view, a reasonable person in the position of Beck would have taken steps to:
- (a) review or obtain independent valuations of the property of the ASF;
 - (b) review or cause to be created a report setting out the unit price for the ASF, how it was calculated, the valuations upon which it was based and how the valuations and calculations complied with the requirements of clauses 5.23, 6.15 and 8.3 of the ASF Constitution and the requirements of the ASF Compliance Plans;
 - (c) remedy any inadequacies or defects revealed by such reports or valuations or absence thereof; and
 - (d) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (c) in the event the

reasonable person did not take any of these steps, including by reviewing relevant documents.

- 8.13 ASIC is concerned that Beck contravened s601FD(1)(f)(iii) and (iv) of the Corporations Act by failing to take the steps set out in paragraph 8.12 thereby failing to take steps to ensure that Trio complied with the ASF Constitution and the ASF Compliance Plans.

Due diligence obligations

- 8.14 Under section 601FD(1)(f)(iv) of the Corporations Act, Trio's officers were required to take all steps that a reasonable person in the position of the officer would take to ensure that Trio complied with the provisions of the ASF Compliance Plan in relation to due diligence, monitoring and supervision of agents, contractors or external service providers and their insurance.
- 8.15 The ASF's investment structure was set up and continued to operate without any due diligence or monitoring by Trio as required by the ASF Compliance Plan. Trio did not, nor did Beck during her directorship take any adequate steps to ensure that Trio did:
- (a) obtain or have available any due diligence reports relating to AAM, its associates or the engagement of AAM as investment manager of the ASF;
 - (b) obtain or have available any due diligence reports relating to EMA, its associates or EMA's entry into the Master DPA and Supplemental Agreements;
 - (c) prepare or have available any report relating to the ongoing monitoring and supervision of AAM, in particular its performance as investment manager of the ASF;
 - (d) prepare or have available any report relating to the ongoing monitoring and supervision of EMA, in particular its ability to perform its obligations under the Master DPA and Supplemental Agreements;
 - (e) receive or have available the regular written reports required to be provided by AAM to Trio under its investment management agreement;
 - (f) prepare or have available any report relating to the insurance of AAM and EMA in respect of obligations owed by each of them to the ASF.

- 8.16 In ASIC's view, a reasonable person in the position of Beck would have taken steps to:
- (a) review or cause to be created due diligence reports relating to AAM, EMA, their associates and the agreements entered into by each of them relating to the ASF;
 - (b) review or take steps to be provided with regular reports from AAM which it was required to provide to Trio under its investment management agreement with Trio;
 - (c) review or take steps to obtain regular reports relating to the monitoring and supervision of AAM (in particular its performance as investment manager of the ASF) and EMA (in particular its performance of its obligations under the Master DPA and the Supplemental Agreements);
 - (d) review or take steps to obtain regular reports relating to the insurance of AAM and EMA in respect of obligations owed by each of them to the ASF;
 - (e) remedy any inadequacies or defects revealed by such reports or absence thereof; and
 - (f) satisfy themselves that Trio had taken the same or substantially similar steps set out in sub paragraphs (a) to (e) in the event the reasonable person did not take any of these steps, including by reviewing relevant documents.

- 8.17 ASIC is concerned that Beck contravened s601FD(1)(f)(iv) of the Corporations Act by failing to take the steps set out in paragraph 8.16 thereby failing to take steps to ensure that Trio complied with the ASF Compliance Plan.

Obligation to exercise reasonable care and diligence and obligation to act in the best interests of members

- 8.18 Under section 601FD(1)(b) of the Corporations Act, Trio's officers were required to exercise the degree of care and diligence that a reasonable person in the officer's position would exercise in relation to the functions and responsibilities of the responsible entity of the ASF.
- 8.19 Under section 601FD(1)(c) of the Corporations Act, Trio's officers were required to act in the best interests of the members of the ASF.
- 8.20 In ASIC's view, a reasonable person exercising care and diligence in the position of Beck would:
- (a) have taken the steps set out in paragraphs 8.8, 8.12 and 8.16;

- (b) not have permitted transactions whereby the ASF's funds were invested under the DPAs when there was no or inadequate information as to:
 - (i) the valuation and value of the rights under the DEAs;
 - (ii) the fund managers of the Underlying Funds;
 - (iii) the likelihood that EMA would or could meet its obligations under the DPAs from its own assets or insurance;
 - (iv) the role and interests of AAM in relation to EMA and the Underlying Funds;
- (c) not have permitted transactions, whether as an in-specie transfer or a transfer in return for payment, whereby the ASF acquired units in the Exploration Fund when:
 - (i) there was no or inadequate information as to the valuation and value of Exploration Fund units;
 - (ii) there was no or inadequate information as to the fund managers involved in the Exploration Fund;
 - (iii) there were known liquidity problems with the Exploration Fund.

8.21 In ASIC's view, the best interests of members of the ASF required an officer of Trio to take the steps set out in paragraph 8.20.

8.22 ASIC is concerned that Beck contravened section 601FD(1)(b) and section 601FD(1)(c) of the Corporations Act by failing to take the steps set out in paragraph 8.20 and thereby failed to exercise reasonable care and diligence and act in the best interests of ASF's members.

Conflicts of interest

8.23 ASIC is concerned that there were numerous and serious conflicts of interest in relation to the investments made by the ASF in the Underlying Funds through the DPA structure. ASIC is further concerned that there was little or no acknowledgement of Trio's responsibilities to address these conflicts and Beck failed to identify, manage and control these conflicts of interest.

8.24 These conflicts arose from:

- (a) Richard's company AAM acting as ASF's investment manager between 26 August 2005 and 22 December 2009 in circumstances where:
 - (i) WGAM a company controlled by Richard acquired all the shares in AFM, the parent company of Trio, in 2003;
 - (ii) Richard was a director of Trio and a member of Trio's Investment Committee at the time AAM was appointed;
 - (iii) Richard was, at various times during AAM's engagement, a director of parent companies, AFM and WGAM, and a member of Trio's Investment Committee.
- (b) the ASF investing, through AAM, in Tailwind, one of the Underlying Funds, when AAM was also the investment manager for Tailwind;
- (c) the Underlying Funds being controlled by individuals who were either associated with Richard, had previously held roles with Trio or its parent companies, or held roles with EMA and GCSL.

9. Acknowledgement of concerns

- 9.1 Beck acknowledges ASIC's concerns as set out in Section 8 and also acknowledges that Section 8 sets out what was required to discharge her responsibilities as an officer of Trio.
- 9.2 In accepting the undertakings set out in Section 10 ASIC notes that:
 - (a) Beck was a non-executive director;
 - (b) Beck joined the board after the initial investments in many of the Underlying Funds were made; and
 - (c) Beck was not a member of the Trio Risk and Compliance Committee and was a member of the Investment Committee for a short period of time only.

10. Undertakings

- 10.1 Under s93AA of the ASIC Act, Beck has offered, and ASIC has agreed to accept as an alternative to pursuing court action seeking, *inter alia*, declarations under section 601FD of the Corporations Act, the following undertakings.
- 10.2 Beck undertakes:
 - (a) not to provide any financial services; and

(b) not to take part in the management of any corporation, with the exception of Rumi Holdings Pty Ltd (ACN 136 831 948) (Rumi), a company that provides corporate consultancy services, on the condition that:

(i) Rumi does not issue any additional securities, within the meaning of s92 of the Corporations Act to any person or entity other than Beck; and

(ii) the scope of Rumi's business does not change,

for a period of 2 years from the time of acceptance of this undertaking by ASIC.

10.3 Without in any way limiting the undertaking in paragraph 10.2(a) above, Beck undertakes, for a period of 2 years from the time of the acceptance of this undertaking by ASIC, not to:

(a) do any act or engage in any conduct as a representative of an Australian Financial Services Licensee;

(b) hold herself out as a representative of an Australian Financial Services Licensee;

(c) carry on a business in relation to financial products or financial services, within the meaning of section 761A of the Corporations Act, either directly or indirectly as a director, partner, manager, servant or agent;

(d) hold out that she is in anyway authorised to provide a particular financial service or services or that she is in any way authorised to provide financial services generally; and

(e) apply to ASIC under section 913A of the Corporations Act for an Australian Financial Services Licence.

10.4 Beck undertakes to provide all documents and information requested by ASIC from time to time for the purpose of assessing Beck's compliance with the terms of this enforceable undertaking.

11. Acknowledgements

11.1 Beck acknowledges that ASIC:

- (a) may issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;
- (b) may from time to time publicly refer to this undertaking; and
- (c) will make this undertaking available for public inspection.

11.2 Further Beck acknowledges that:

- (a) ASIC's acceptance of this undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this enforceable undertaking or arising from future conduct;
- (b) this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

11.3 Beck acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an enforceable undertaking in the terms of paragraphs 10.1 to 10.4.

11.4 Beck acknowledges that this undertaking has no operative force until accepted by ASIC, and Beck and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

Natasha Beck

Accepted by the Australian Securities and Investments Commission under s93AA of the ASIC Act by its duly authorised delegate:

.....
Delegate of Australian Securities and Investments Commission

Dated 4 July 2011