

**ACTEK SUPERANNUATION PTY LTD att ACTEK SUPERANNUATION FUND**  
**A Unitholder in : The ARP Growth Fund**

16<sup>th</sup> August 2011

**Submission to the Enquiry into the collapse of TRIO Capital and any other related matters**

**INTRODUCTION:**

This submission is made by ACTEK SUPERANNUATION PTY LTD as Unitholders in ARP Growth Fund and is based on the experience of the loss of almost all the life savings totalling approx. \$1.78 million of the two members of the Fund Roy Douglas Fowler and Barbara Dawn Fowler.

**THE OUTCOME WE SEEK - Without delay given the financial disaster experienced by many..**

**A)** As the Government Regulators ASIC & APRA clearly failed to properly supervise TRIO, the Government has a clear duty to compensate Self Managed Superannuation Funds with the same 100% compensation as they have with other investors. Exactly the same circumstances caused losses to SMSFs as to individual investors so it is grossly unfair to treat SMSFs differently. WHY are we excluded ? Even Justice Garling of the NSW Supreme Court earlier this month commented on the unfairness of SMSFs being excluded from compensation in view of the circumstances of the collapse.

**B)** If Auditors (and Risk Assessors), Compliance Auditors, trustee and custodian Banks failed in their duties of care ASIC should aggressively pursue civil proceedings to recover lost funds which could contribute to the Government compensation to ARP Growth Fund SMSF unitholders as in (A) above.

The Audit & Risk reports had indicated the fund complied with Government requirements. Research company reports also offered positive recommendations.

Imagine our disappointment to hear from the Hon. Bill Shorten in relation to those investors to whom they are paying compensation that the government will compensate "victims who are victims through no fault of their own" and exclude SMSFs. The implication is that it is our fault that we are victims, when SMSFs is a mechanism encouraged by the Government for the financial planning of retirees.

**C)** Enactment of Legislation requiring SMSFs to pay a levy based on a small percentage of their Fund balance at 30<sup>th</sup> June each year to build a reserve to compensate victims of future collapses in response to the stated expectation by the Hon. Bill Shorten as reported in the SMH Editorial of 14/4/11 that "crooks, thieves and charlatans will always be out there". This could be a mandatory levy to cover all SMSFs or a voluntary "insurance-style" levy covering only those who choose to participate. See detailed suggestion in (8) below.

**D)** Enactment of Legislation to ensure that all in the industry including REs, Licensees, Advisers, Auditors etc are covered by realistic and sufficient Indemnity Insurance. Current requirements are totally inadequate, thus making it entirely uneconomic for SMSFs to take legal action against them. Perhaps an "insurance" fund, akin to a fidelity fund, could be established whereby their current Insurance Premiums could be combined with a SMSF levy as suggested in (C) above and (8) below.

**E)** More funding to ASIC and APRA to enable them to better supervise and more efficiently and more quickly act to **ensure** investors are protected.

### **1) TYPE OF Investments.**

Advisers and Regulators need to review the types of investments in which Self Funded Superannuation Funds (SMSFs) and Responsible Entities (REs) are allowed to invest. It can now be seen that, for example, the types of funds the RE, TRIO Capital Ltd, invested funds of SMSFs were unsuitable and not monitored by Regulators.

In a judgement on 16<sup>th</sup> April 2010 by Justice George Palmer of the NSW Supreme Court he said in respect of at least one of the PDS : “ the PDS was nothing more than gibberish” !

It appears that the Regulatory regime is not ensuring that PDSs conform to Regulations. This appears to us to be a most serious error.

In relation to the transfer of over \$50 million of ARP Growth Funds to offshore entities the question needing an answer is who authorised these and were they in breach of any regulations? If the Government, through the Regulators, permitted these transfers as being within the regulatory framework, then that is even more reason why there should be equivalent compensation for SMSF's to those in regulated funds.

### **2) The points of failure in relation to products or advice:**

It now appears that the products were irregular and lacked sufficient explanation. Advice to retirees to invest in such products, and the Government permitting this to occur in such large amounts, begs questions of whether the regulators were ‘asleep at the wheel’.

In December 2006 APRA concluded that the Trustee Astarra (TRIO) should take over more of the Administration of the Pooled Superannuation Trust (PST) and clients were transferred to a new MIS “Professional Pensions Fund” retaining the same investments in ARP. How closely did APRA look into these entities ?

It is widely reported that in an APRA investigation of TRIO in 2007 they were unable to find any valuation methodology. Surely they should have pursued this until they found the methodology? Was ASIC advised ?

We refer your committee to the Audit Report and Risk Assessment at 30<sup>th</sup> June 2008 particularly comments re valuations. The risk report was glowing.

In addition to TRIO auditors, the ARP Auditor up to 30<sup>th</sup> June 2007 Einfeld Symonds Vince 55 Market St Sydney may be able to assist your enquiries. SMSF members would be entitled to expect ASIC to take appropriate proceedings, as done in other cases where retirees' funds have been lost, such as Westpoint.

### **3) The relationship between SMSF arrangements and regulatory coverage:**

We submit that the SMSF arrangements and their regulatory coverage are wholly inadequate. It needs to be reviewed and clear responsibilities be allocated, with sufficient powers of investigation and enforcement.

### **4) The role of ASIC in monitoring Trio Capital and subsequent pursuit of directors, auditors, advisors and fund managers**

As ASIC and APRA failed to effectively monitor TRIO surely it is incumbent upon ASIC to aggressively pursue all directors, advisers, fund managers, auditors, custodians etc to recover funds, ensure they have not secreted funds in attempts to avoid repayment and where breaches of any regulations are discovered use the full force of the law against them. It is a common view in the community that “white collar” breaches of laws often result in lesser penalties than is the case of “blue collar” offences. This is

strikingly highlighted by the paltry 2.5 years (compared to a maximum penalty of 10 years) plus 15 months good behaviour bond given to Shawn Richards on 11/8/11.

#### **5) The APRA regulatory relationship to Trio Capital and the use of SMSF:**

It is our belief that the enquiry should call for all documents and communications by APRA in relation to all their discussions and investigations into the entities and persons involved.

You need to have full knowledge of the APRA 2007 investigation of TRIO when, as reported, they were unable to find any valuation methodology. This is a vital point in this enquiry.

Also in relation to APRA and SMSFs we suggest that you explore whether it could be better for APRA to be the Regulator of SMSFs instead of ASIC especially given ASIC's extra workload now with their regulation addition of the ASX. In November 2010 Mr D'Aloisio reported to the Joint Statutory Committee on Corporate and Financial Services on 24<sup>th</sup> November 2010 that ASIC was currently investigating 300 cases and had 120 matters before Courts. Do they have sufficient staff and sufficient funding for this level of investigations ?

#### **6) The access to compensation and insurance for Trio Capital investors including in fraud:**

In answer to a question by the Hon. Paul Fletcher at the Joint Statutory Committee on Corporate and Financial Services on 24<sup>th</sup> November 2010 about the importance of maintaining confidence in the integrity of the markets the then head of ASIC Mr Tony D'Aloisio stated in part :  
(my bold highlights)

*"Compensation for investors can arise under different provisions of the Corporations Act. They can be under what are known as 'section 50 actions' and they can be compensation orders that are **consequential on civil penalty proceedings** that may have occurred or declaration—the two key ones.*

*What we have to weigh up when it comes to taking compensation action is a public interest test under section 50. In effect it says to you, 'Should you spend public money to recover private losses?'*

*We have to look at the public interest considerations. You look at the investors, **whether they are likely to be able to take action themselves**, what sort of class of investors they are and so on.*

***A good example is Westpoint.** In the Westpoint case we looked at that and we took regulatory action by banning advisers and so on. We took the view that there were actions that the investors in the mezzanine companies should pursue against the auditors, financial advisers and directors.*

*In that case, from the point of view of public policy and public interest, we decided to take the actions on their behalf under section 50. **We have been, so far, reasonably successful in those.**"*

*And further on :*

***"Certainly if as a consequence of taking civil penalty actions we can put in a compensation claim for the investors on that we will generally try to do so. It is case by case.***

*We have a much more limited role which generally **tends to be around cases where we would feel the group of investors need the ASIC protection in order to assert their rights.** As I said, the best example is Westpoint. **We have made statements in relation to Storm in a similar vein.**"*

In another statement ASIC has said that in the ARP collapse the total amount of Indemnity Insurance available in the various directors and entities policies (excluding Auditors we would think) is so small it is not a proposition to sue. If that is so, then how could ASIC have complied with its own regulatory guidelines on adequate insurance for financial services licensees?

**In any event, in the Westpoint matter we believe ASIC took action against KPMG to get investors' funds back so we ask that in our case ASIC take action against auditors, as well as other entities and individuals so that ARP SMSF investors are not required to bear the costs and risks associated with such an action themselves.**

**If Westpoint and Storm collapses were in the public interest surely the biggest superannuation scam in Australia's history, showing regulatory lapses and failures, should warrant ASIC taking action to recover funds for victims.**

**According to a recent report the ATO has collected \$394.4 million in Excess Contributions Tax (ECT) in 2007/2008 and 2008/2009 and they expect twice as much for 2009/2010. This has become a significant revenue raiser when the ATO expected this revenue to decline. As much of this would have come from SMSFs and the ATO also regulates SMSFs why not use some of these funds to compensate SMSFs suffering from the TRIO collapse ?**

**7) The issue of fraud (in particular international fraud) in the collapse of Trio Capital and regulatory implications;**

There needs to be stricter checks of entities and persons to whom licenses are given as there have been reports that some of those involved such as Jack Flader Frank Bell, Philip York and James Sutherland have had serious actions brought against them by Financial Regulators etc. in USA and UK.

The inadequacy of the AFS licensing is highlighted in an article by Adele Ferguson in Sydney morning Herald 15<sup>th</sup> August 2011 titled "Sonray Founder's exposure dramatizes how advisers can operate through back door ". Ferguson reports on serious flaws in the ASFL system and weaknesses in the legislation. "The test for AFS licensing is good fame and character". "This means ASIC cannot refuse to issue a license unless it can form the belief that the applicant will not comply with the obligations set out in the Corporations Act." "It means anyone who wants to can set up shop either applies to ASIC for an AFSL or applies to be a representative of an AFSL holder "

It is hard to believe that so much money has disappeared and it is not fully understood how and where it went to. There seems to be little or no progress in retrieving the money. Are the Australian Federal Police involved ? What investigation has there been as to whether those involved have funds secreted away overseas. Can persons of interest be interrogated overseas or extradited and forced to reveal where the money was sent or is now ?

**8) Whether there are adequate protections against fraud for those who invest through self-managed superannuation funds as opposed to other investment vehicles;**

It is clear that current Professional Indemnity insurance requirements are totally inadequate and it is doubtful that PI insurance alone can protect sufficiently as it is not a catch-all scheme. There has to be protection against fraud as well as negligence, lack of duty of care etc. The current Auditors' liability ceiling of 10 times the Audit fee is entirely inadequate and should be reversed by legislation in favour of SMSF's. We believe that many in our society are keen to see that Auditors should bear responsibility for their Audit as they are paid to EXAMINE the accounts.

We also suggest an insurance style cover or fund be created to protect SMSFs which either incorporates Financial Planners' and the RE's PI Insurance or is in addition to such Insurance.

It is acceptable practise in Australia that one can insure against just about everything so perhaps the responsible Minister the Hon. Bill Shorten could introduce a scheme where every SMSF has to contribute to a joint insurance/fund against loss through neglect, lack of duty of care, misleading information AND including fraud ? Financial advisers, RE's etc could also be required to contribute to the insurance premium/fund and, because Government has a regulation responsibility, they too should either contribute or share some of the risk by a contribution to any compensation to SMSFs in the

LIKELY event of a TRIO or WESTPOINT style collapse occurring again. The Hon Bill Shorten expects future losses as indicated by his comment in April 2011 that “crooks & thieves & charlatans will always be out there”.

A deal with an insurer on behalf of ALL participants could present an acceptable plan to achieve a much lower bulk premium than if SMSFs or advisers negotiated individually. SMSFs would pay a percentage (to be arrived at by actuaries) of their total funds as at 30<sup>th</sup> June each year as insurance against any kind of collapse and so avoid any future devastation like TRIO. It could be a separate amount to the (now) \$180 pa we pay annually. Given the billions of dollars in SMSF funds the percentage of the total should calculate as acceptably small..

A levy as low as 0.02% on the billions of dollars in SMSFs plus accruing interest would quickly build into a significant fund. Even more so if Insurance premiums of advisers etc were included in the scheme.

We congratulate the Government in establishing the Statutory Compensation Review Future of Financial Advice by Mr Richard St John. The review brief makes mention of a compensation of last resort scheme in operation in the UK which could help in establishing in Australia a scheme similar to the one proposed in (8) above.

Some SMSFs have already spoken out against an SMSF levy similar to that in place for APRA supervised funds. If the complainers had experienced the magnitude of losses experienced by ARP Growth Unitholders we feel sure they would agree with our proposal. An alternative could be that SMSFs could opt IN or opt OUT of such a scheme ?

The large Super funds regulated by APRA and their members probably also did not like to pay the Super Compensation Levy and we suggest many Members in APRA supervised funds would not realise that their funds have to pay such a levy and as it is part of their costs it is obviously shared amongst all members ! So too a scheme such as we propose would be shared amongst ALL SMSFs.

#### **9) The appropriateness of information and advice provided to consumers, and how the interests of consumers can best be served in regulated and unregulated environments;**

Product Disclosure Statements need to be able to be easily understood by the average “man in the street”. Justice George Palmer of the NSW Supreme Court commented on a PDS recently that “it was nothing more than gibberish”.

This is a REGULATED environment so surely ASIC & APRA must be held responsible for ensuring that the information in all PDSs is appropriate.

#### **10) The role of ratings agencies and research organisations in product promotion and confidence;**

The questions in our minds are (a) who funds the research organisations and to what extent ? (b) Is their advice independent ? (c) how is product promotion paid for ? We don't know the answers but are hopeful your committee finds the answers. If the research organisations have any obligations to, or commercial relationships with, the funds it seems obvious this should be forbidden.

#### **11) Any other matters relevant to the collapse of Trio Capital in the further improvement of the financial services sector and consumer protection.**

Trustees of SMSFs have been referred to as investors “swimming outside the flags”. If we pursue this analogy the Regulators did not ensure there were flags in place or allowed the flags to be placed in the wrong positions and/or did not have an effective patrol on duty to ensure all concerned stayed within the flags !

It has been commented that some SMSF's are reckless investors. SMSFs invested in similar funds to **APRA regulated retail super funds** but SMSFs don't receive compensation Surely It is discriminatory and unconscionable on the part of the Government to compensate one group and not the other when both invested in the same funds.

Following the GFC, the Govt. guaranteed **ALL DEPOSITORS and their Term Deposits** with all the banks and credit unions up to \$1 mill. If I had invested \$1 million with a Bank and the Bank is unable to pay me back I would get my money back but if I put my \$1 million in an investment fully regulated at every stage by Government I don't get my money back but some others do ! In this case the Bank hasn't failed us - the Government Regulators have ! Surely this is discriminatory.

A recent survey (see link attached at bottom of this page) revealed that 91% of ARP Growth Fund Unitholders are over 60 years with little or no chance to build superannuation again. 17% have lost their homes and 66% have suffered health problems as a result of the loss.

To ensure the public continues to feel safe investing in Superannuation, ASIC or APRA should always take recovery actions anyone who has breached regulations.

The generally held view by commentators and the public is that the current compensation under Part 23 of SIS to APRA regulated superannuation fund investors and not to ASIC regulated fund SMSF investors is poor public policy, unsustainable and clearly has no logical or moral basis.

In all fairness the Government should correct the current anomaly and now compensate SMSFs who lost their money in the ARP Growth Fund through no fault of their own (as those who **have** been compensated have been described) and the Government should fix this anomaly in the public interest for the future by introducing a compensation scheme to cover all, similar to that outlined in our item (8) comments above. To fail to do so will ensure greater dependency on Government benefits and lack of independent living for such retirees, at a greater costs ultimately for the Government in this generation and those who follow them.

**For example, it is in the Government's interests to develop an all-embracing compensation scheme when such failures occur as Government is then faced with the increased burden of having previously self funded retirees approaching Centrelink seeking pension payments !**

We sincerely thank the committee for the opportunity to make a submission to your enquiry into this devastating collapse and hope this submission assists you to put right the anomaly of some TRIO investors not receiving compensation and also make the necessary changes in regulations and to avoid future collapses of this kind.

**ACTEK SUPERANNUATION PTY LTD att ACTEK SUPERANNUATION FUND**

Roy Douglas Fowler  
Director

Barbara Dawn Fowler  
Director

## **ARP GROWTH FUND SURVEY results**



ARP Survey Results  
May 2011.xls

**Association of ARP Unitholders Inc. - Survey Results as at 24th May 2011.**

<b>Age Group</b>	<b>Under 60</b>	<b>60 - 65</b>	<b>65 - 70</b>	<b>70 - 75</b>	<b>Over 75</b>
	↓	↓	↓	↓	↓
	<b>9%</b>	<b>23%</b>	<b>21%</b>	<b>36%</b>	<b>11%</b>
<b>Marital Status</b>	<b>Married</b>		<b>Widowed</b>		<b>Single</b>
	↓		↓		↓
	<b>83%</b>		<b>13%</b>		<b>4%</b>
<b>How long did you contribute to the ARP Fund or its predecessors ?</b>	<b>0 - 5 Yrs</b>	<b>5 - 10 Yrs</b>	<b>10 -15 Yrs</b>	<b>15 - 20 Yrs</b>	<b>Over 20 Yrs</b>
	↓	↓	↓	↓	↓
	<b>2%</b>	<b>2%</b>	<b>17%</b>	<b>21%</b>	<b>58%</b>
<b>Have you been forced to sell your Home or other Assets ?</b>	<b>Home</b>	<b>Yes</b> →	<b>17%</b>	<b>Other Assets</b> →	<b>40%</b>
		<b>No</b> →	<b>83%</b>		<b>60%</b>
<b>Do you have any other Investments apart from the ARP Growth Fund ?</b>		<b>Yes</b> →	<b>58%</b>		
		<b>No</b> →	<b>42%</b>		
<b>Have you been forced to go to Centrelink ?</b>		<b>Yes</b> →	<b>32%</b>		
		<b>No</b> →	<b>68%</b>		
<b>Was your Centrelink application successful ?</b>		<b>Yes</b> →	<b>87%</b>		
		<b>No</b> →	<b>13%</b>		
<b>Has your health been affected since the ARP Growth Fund collapsed ?</b>		<b>Yes</b> →	<b>66%</b>		
		<b>No</b> →	<b>34%</b>		