

## ACTEK SUPERANNUATION FUND

18th February 2012

The Hon. Bill Shorten,  
Assistant Treasurer and Minister for Financial Services & Superannuation  
P.O.Box 6022 Parliament House  
Canberra ACT 2600

### RE NEW ASIC REVELATIONS RE COLLAPSE of ARP Growth Fund and TRIO Capital Ltd.

Dear Minister,

As a consequence of a press release by ASIC on 2<sup>nd</sup> February 2012 attaching the ENFORCEABLE UNDERTAKING (EU) given to ASIC by Paul Gresham (who recently changed his name to Tony Maher), we have great cause to again make contact with you and ask for your help.

Gresham was CEO of PST Management Pty Ltd, which controlled and managed the ARP Growth Fund and in turn the superannuation savings of our SMSF and those of 73 other SMSF unitholders.

The contents of the EU and the admissions by Gresham have devastated us and the 73 mostly aged persons (we are 80 and 77) who have lost life savings totaling over \$54 million and/or their homes. In some cases people have lost their health. In our case, our letter to you of 1<sup>st</sup> October 2010 (attaching a copy of our original complaint to ASIC dated 22/4/10) detailed the loss of most of our life savings (\$1.48 million). As a result, we and many others are likely to become dependent on the State to survive.

This is a direct result of the wrongdoings of Government agencies and the failure of all other gatekeepers.

It is timely to note in 2.1 in the EU the reference to **"Under section 1 of the ASIC Act, ASIC is charged 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."**

This obviously includes SMSFs. In our view (and that of many others) ASIC & APRA, as well as the many other "gatekeepers", have failed in their duty of care. This is confirmed by evidence to the Joint Parliamentary Committee (JPC) Inquiry. The collapse is obviously NOT directly due to the GFC as has been suggested.

Had we been aware of the many issues detailed in Gresham's Enforceable Undertaking we would obviously have included them in our Submission to the Joint Parliamentary Committee. A copy of this letter with our additional concerns will also be forwarded to the Hon. Bernie Ripoll, Chairman of the Parliamentary Joint Committee on Corporations and Financial Services, and the Hon Paul Fletcher, our local member.

In particular we raise the following issues after studying the EU :-

**1)** When, in January 2004, Gresham recommended to Trust Company (the Fund Trustee) to change the investment strategy to include property, derivatives

and offshore hedge funds, the Trust Co. subsequently advised him it was reluctant for the investment strategy to be changed to include such alternative investments. Gresham immediately moved to have Trust Company replaced as trustee by Trio.

In March 2004, Gresham became involved with Shawn Richard (now gaoled) and Mathew Littauer (murdered in Asia in suspicious circumstances) who controlled TRIO. They said they WOULD allow such alternative investments. (Gresham had assisted Richard and Littauer with \$900,000 client funds to buy TRIO). So why did Trust Co. on 14<sup>th</sup> APRIL 2004 whilst still trustee allow Gresham/PST to invest \$4.75 million in the Fund's assets in the Silverhall private property trust when they had already told Gresham they would not agree to such a change in investment strategy to include property and other such investments? Were they also aware of Gresham's intention to invest \$1.5 million in highly speculative derivative strategies in a foreign fund in Saint Lucia which was finalized in October 2004?

2) Did Trust Company have an obligation to advise Unitholders and Regulators of their concerns? The scam could have been halted at that stage in 2004 if Trust Co. had appropriately reported. Who was the Custodian and did they have similar responsibilities in relation to the location and destination of the Fund assets?

It has been suggested that if the whistleblower had not persisted by bringing the matter to the attention of Mr. Ken Henry (at that time head of Treasury) after getting no action from ASIC, there is a possibility these scams would still be ongoing.

3) The JPC Inquiry, at which I attended all public examinations, heard evidence that APRA investigated TRIO in 2005 and forced some Directors to be replaced because of conflicts of interest and required an independent board be established. In view of these conflicts of interest what follow up did APRA do to ensure new Directors were acting independently? The Supreme Court Public Hearings in November 2011 (which I attended) heard that the replacement TRIO Directors simply did as they were told by the Directors they replaced and **didn't even understand** the investments. Why would APRA (or ASIC if referred) not have checked the existence, location and true valuation of the Fund assets at that stage? Surely such a superficial performance by Government agencies is abhorrent to a well functioning financial services system on which all people (and mainly the elderly) rely.

4) The EU clearly shows that Gresham also had conflicts of interest and that in 2008 and possibly earlier he was making up the valuations himself and passing these unsubstantiated and misleading valuations on to ARP unitholders via TRIO Capital Ltd. In view of the forced change of Directors due to conflicts of interest why didn't APRA or ASIC follow up to ensure that valuations were correct? Why didn't APRA and ASIC have in place systems to ensure that there were real valuations and that the assets could be verified? It is all very well after the horse has bolted for ASIC and APRA to crow about how well they have taken enforcement proceedings against a large number of individuals, but it simply highlights how much they missed at the time. They took their 'hands off the wheel'.

5) APRA's submission to the Joint Parliamentary Inquiry states they take "**a risk-based approach ... regularly analysing the financial condition of institutions and reviewing their risk management**". So in 2004/05 when APRA discovered poor governance and unit valuation problems in TRIO and when in 2008 APRA were unable to obtain valuations methodology why didn't APRA pursue these serious problems in the Fund and its management?

6) Did APRA inform the Auditors or ensure Trio advised both the Auditors and the separate Compliance Auditors of the earlier concerns? It has since been stated by ASIC that both Audit and Compliance Audit regimes failed. Is ASIC taking any representative action on behalf of unitholders in ARP Growth, as it has done in other financial collapses? If not, why? The public interest in doing so is manifest.

7) Why was TRIO not forced by Regulators to advise Unitholders that there were no valuations or even a methodology? Surely, it smacked of fraud as soon as these facts were known?

8) In December 2006 APRA reviewed Gresham's PST Management Pty Ltd and concluded the Trustee Astarra (TRIO) should take over more of the administration of PST. This resulted in the seamless transfer of our funds into ARP Growth Fund. How closely did APRA review PST in 2006 when, according to what APRA now says, the scam was already well in operation? Its misfeasance in this regard is astounding.

9) Were ASIC informed by APRA of their concerns in 2004/2005 about TRIO and associated Funds when ARP Growth Fund regulation moved from APRA to ASIC in July 2007? If not, why not? If so why didn't ASIC investigate? How could ASIC approve PDS documents, to attract funds, which a learned judge has described as 'gibberish'? Surely the investing public has the right to expect that ASIC will ensure such documents are not issued and lure unsuspecting retail investors?

10) In their evidence to the JPC Inquiry, APRA stated moneys went offshore in 2003-2005 and now believe the fraud started then. Gresham's EU shows that all wrongdoings took place from then onwards (refer EU Item 6) whilst PPST (the Fund which became ARP Growth Fund) **WAS REGULATED BY APRA**. Does it not therefore follow that being regulated at that time by APRA our Unitholders are entitled to compensation under clause s23 of the SIS Act 1993?

11) The EU reveals Gresham's false and misleading actions, the "kickback" payments he received and clearly establishes he put his own interests ahead of those of unitholders. Have there been investigations by ASIC of the possibility of funds secreted away here or overseas by Gresham and Richard and the possibility of recovery? Has there been any investigation of a representative action being taken by ASIC directly against the insurers of Gresham, PST, Wright Global and Trio to achieve compensation for unitholders? Surely, given the various failings of the Government agencies, this is the least that could now be done? It has done so in far less deserving cases.

In an amazing coincidence my wife Barbara and I saw and spoke to Gresham in Cenrepoint on 24<sup>th</sup> January 2012. He would not give us his address or email but reluctantly gave a phone number in the Blue Mountains. He boasted he had returned to Australia voluntarily from Hong Kong. We had (apparently mistakenly) believed he would have had to forfeit his passport. We asked if he had seen Philip York and "others" in Hong Kong and he replied "no but ASIC and Liquidator PPB are in contact with Philip York". We are not aware of any comment re investigation of York's involvement.

Whilst now banned from involvement in the finance industry in Australia can Gresham, with his new name Maher, move to Hong Kong and join York, Flader and others in further scams? Should his passport be impounded until investigations are completed?

12) ASIC states in their submission to the Joint Parliamentary Inquiry that they do not offer an EU **"when clear relevant misconduct constitutes criminal conduct"**. Gresham has admitted dishonest conduct and APRA have referred to his actions as fraud but ASIC has accepted an EU. What further action is likely against Gresham?

13) What action is proposed against gatekeepers as ASIC, in their report to the Joint Parliamentary Inquiry, states its **"FSR regime oversees and enforces compliance, for example holding gatekeepers to account"**? The Titanium Asset Management debacle reported in today's "SMH Weekend Business" again highlights the same type of poor supervision and inaction by ASIC as is evident in the ARP Growth Fund/TRIO collapse. It again smacks of ASIC grabbing headlines to cover its own inadequate conduct of the past.

14) Trustees of APRA regulated funds are required to have adequate Professional Indemnity (PI) insurance cover which also specifically includes fraud cover. Why didn't APRA, ASIC, the Auditors or Compliance Auditors discover that the various entities and persons held inadequate PI Insurance cover and ensure this was rectified? NSW Supreme Court Justice George Palmer was also highly critical of the misleading Product Disclosure Statement!

15) In evidence to the JPC Inquiry, the Custodian said they had an obligation to only check with TRIO if they had any doubts about where the money was being sent overseas. Is this correct? If so surely there is need for legislative change to ensure Custodians are obliged to really act as custodians.

16) As part of the Government's announcement to grant financial assistance to Trio investors (excepting SMSFs) the Government stated that the reason for providing full compensation was to ensure consistency with other compensation arrangements under the Financial Claims Scheme for ADIs (ie banks or insurers) in the event of a collapse. Is it fair that there is a compensation scheme for banks & insurers and not for elderly Australians in SMSFs when victims of Australia's biggest ever superannuation scam ?

Governments have encouraged Australians to provide for their own retirement and not be a burden on the taxpayer. We and a huge number of other Australians have done this via SMSFs. We ask that the Government, together with ASIC, act to recover the missing SMSF millions from ARP Growth Fund by seeking cooperation of Hong Kong and British Virgin Islands Governments, Interpol etc or, as in the case of the Westpoint collapse take action against the various gatekeepers including Auditors who failed in their duty of care. The insurers of all professionals should also be targeted in the public interest. ASIC has stated that it has to consider if it is in the public interest before running a class action to obtain compensation for investors. If ASIC's actions in the Westpoint and Storm collapses are in the public interest surely so is action in the TRIO collapse. Also the publicity of such an action would be helpful in educating the investing public.

Failing this, in all fairness and morality we ask that the Government, by special arrangement, compensate ARP Growth Fund SMSF unitholders just as was done for investors in retail funds.

We are of course conscious of the Government's tight budget situation but note that the ATO were reported last year as being hugely surprised to receive a bonanza of fines from persons who incorrectly overpaid into Super Funds (including SMSFs). As this amounted to several hundred millions of dollars in excess of their estimate and they said they expected more

excesses in the following year and as these resulted from Superannuation activities would it not be appropriate and just to apply some of these funds to ARP unitholders as compensation because **as a direct result of the of Government Regulators' failure we unitholders have lost life savings !**

In August 2009 we and other elderly unitholders ceased receiving our previous pension income. After two and a half years we are now hopeful of receiving some return of funds or compensation now that more of the truth is being revealed. We make this submission with respect and thank you in anticipation of your interest, support and action on this proposal.

Sincerely,  
ACTEK Superannuation Fund

Roy Douglas Fowler  
Trustee

Barbara Dawn Fowler  
Trustee