Association of ARP Unitholders Inc
Ron Thornton,
President

17 August 2011

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Re: Submission from the Association of ARP Unitholders Inc to the Inquiry into the collapse of Trio Capital and other related matters

Attached is the submission from the Association of ARP Unitholders Inc to the Parliamentary Joint Committee Inquiry into the collapse of Trio Capital Limited and other related matters. It has been prepared by volunteers of the Association, the majority of whom are ARP Growth Fund unit holders.

By way of background, the Association was formed by ARP unit holders after the collapse of Trio, so as to collectively liaise with the liquidators and other relevant bodies in an effort to understand the circumstances behind the demise of Trio Capital Limited and the whereabouts of their investments. The objectives of the Association are:

> *"To represent and promote the interests of investors in entities managed by or otherwise associated with (or formerly managed by or associated with) Trio Capital Limited (including the ARP Growth Fund), to lobby relevant authorities in respect thereto, to seek compensation for members in respect thereto, to provide information to members in respect thereto and to undertake activities incidental thereto".*

Our submission gives background information and detailed responses, setting out the Association's views on the Terms of Reference into the collapse of Trio Capital Limited, which was the Responsible Entity for the ARP Growth Fund. Our submission ends with a number of recommendations for the Joint Parliamentary Committee to consider. These are contained in our response to item 11 under the Terms of Reference.

Our submission highlights a trail of possible criminality and fraud that may have incurred in the ARP Growth Fund and Trio Capital Limited. It is the view of the Association that the current ARP Growth Fund situation is likely to have arisen directly as a result of deliberate acts of fraudulent behaviour on the part of certain key individuals and parties, aided by the unreasonable failure of industry regulators (and others) to have stopped them so doing through the execution of their statutory and professional duties in a timely, diligent and effective manner. We strongly urge that it is in the public interest for this to be investigated.

For most ARP Growth Fund unit holders, the winding up of the ARP Growth Fund amounts to a financial wipe-out of their entire superannuation. This has caused immense hardship to unit holders as most are at retirement age and they have no opportunity to re-enter the workforce to support themselves and to re-fund their retirement. Attached to this submission are individual impact statements from selected ARP Growth Fund unit holders, telling their story of the affect which the collapse of the fund has had on their lives. They are all willing to appear in person before the Joint Parliamentary Committee at a public hearing, if it is the desire of the Committee.

The Association believes that the self managed superannuation fund unit holders in the ARP Growth Fund have been needlessly let down by the institutions and regulators set up to protect genuine long term superannuation investors in Australia, and that they consequently deserve a level of compensation no less than that already paid to other Trio managed "regulated" superannuation investors.

The ARP Growth Fund unit holders in effect simply chose to use a different type of superannuation funding vehicle, as provided for by the enabling Federal Government legislation.

They should not be penalised for making that choice

Yours sincerely

For and on behalf of the Association of ARP Unitholders Inc
Ron Thornton
President

Executive Overview: The ARP Growth Fund Position on the Trio Capital Limited Matter

The ARP Growth Fund is one of a number of Managed Investment Schemes (**MIS's**) and superannuation funds that were managed by Trio Capital Limited (**Trio**). It has shared with those other Trio managed schemes and funds the devastating economic consequences of the collapse and the subsequent winding up of Trio. To the extent that the collapse of Trio was the result of a common set of failure points across all funds, the Association's submission will be pertinent to all funds.

The Association's comments in this submission are however of necessity focussed on the specific circumstances of the ARP Growth Fund itself, and the wide variety of unexplained matters that appear to be unique to that fund.

The Association is also concerned about the apparent anomalies in the payment of compensation to different classes of superannuation investors. While defrauded investors in APRA "regulated" superannuation funds have had their losses fully reimbursed, unit holders of the ARP Growth Fund (i.e. in "self managed" superannuation funds), who have proportionately suffered even greater losses per capita, have perversely been totally excluded from any form of compensation.

The ARP Growth Fund holds the superannuation assets of 74 unit holders, which were reported to exceed $54 million as at November 2009[1]. Key dates and events since then include:

1. **November 2009.** Pension payments and withdrawals from the ARP Growth Fund were frozen by ASIC.

2. **April 2010**. The ARP Growth Fund (and other Trio managed funds) was wound up by a Court order issued by Justice Palmer, being the result of what the judge described as a "fraudulent scam"[2].

3. **May 2010**. The ARP Growth Fund liquidators, PPB Advisory[3] (**PPB**), issued a report into the fund in which they ascribed a nil current value to the assets in the fund. PPB listed a number of "possible offences" which needed further investigation against the directors, auditors, custodian and investment manager. These included possible breaches of, *inter alia;* the Corporations Act, the Trade Practices Act, the Crimes Act and the Trustee Act.

4. **July 2010**. PST Management Pty Limited **(PST**) was placed into liquidation. PST has played a central role in the formation, investment management and valuation of the ARP Growth Fund and in communications to its unit holders. The liquidators, Dean-Willcocks Shepard Recovery & Strategy, issued a report in March 2011 noting numerous possible offences under the Corporations Act 2001. They then lodged a report with ASIC, detailing these offences. The liquidators report however that "ASIC advised that they will not be further investigating the matter"[4] (No reason provided).

5. **July 2011**. Shawn Richard, a key player in the Trio saga, was formally convicted of dishonest conduct in relation to the Trio fraud. Justice Peter Garling is quoted as asking a number of questions, to which this Association would also like to receive answers:
   - Where were the auditors while this was going on? Were they "asleep on duty"?
   - What was the Trio Investment Committee doing?
   - What about the Trio directors?
   - The Association feels that the situation is neatly captured by media reports of the comments of Justice Garling in the criminal proceedings against Shawn Richard:

     "Justice Garling said he did not understand the principle by which funds regulated by the Australian Prudential Regulation Authority could receive federal government compensation but self-managed superannuation funds could not.

---

1 Media report. http://www.smh.com.au/business/arp-growth-liquidator-finds-assets-are-worthless-20100518-vc61.html
2 Media report. http://www.businessday.com.au/business/judge-blasts-trio-scam-20100416-skn0.html
3 PPB Pty Limited trading as PPB Advisory (ABN 67 972 164 718).
4 Report to Creditors. Dean-Willcocks Shepard. Recovery & Strategy. (ABN55 482 984 34024) March 2011.

In the case of Trio, the former have received $55 million and the latter have received nothing.

"So the principle is if you are bigger and regulated you get compensation … if you are smaller and vulnerable you don't?" he asked Mr Payne [Anthony Payne SC, appearing for the Commonwealth DPP]."[5]

The investigation into the affairs of the ARP Growth Fund by ASIC and PPB has been protracted and remains on-going. By the time this Joint Parliamentary Inquiry is due to report, more than two years will have elapsed since the collapse of Trio. Over that period existing ARP Growth Fund pensioners will have received no income from their monthly allocated pension's payments, and all unit holders now have to plan for a future in which it is expected there will be no value to fund future pension payments.

The Association, and its members, are therefore seeking answers to:

- how this situation occurred,
- why it was allowed to do so, and
- what are the Federal Government's and its agencies' plans to rectify the situation.

So far there has been no prosecution of any party in regard to the ARP Growth Fund related offences. Indeed, at one point the actual investigation into the events surrounding the ARP Growth Fund seemed to have ground to a complete halt. It was only after the Association and its members applied pressure to ASIC to provide special funding, that PPB recommenced their investigations.

In addition to the above concerns, there have been numerous reports in the media over the past eighteen months alleging a broad range of dishonest activity and regulatory failure on the part of key stakeholders. Included in these have been allegations that the self managed superannuation sector, amounting to one third of Australia's entire pool of superannuation savings, are at risk as a result of inadequate protection against fraud[6]. This inadequacy has been exposed by the collapse of the ARP Growth Fund. Yet there still seems to be a great reluctance by the appropriate authorities to believe that it is in the "public interest" to have these allegations fully and properly investigated.

The Association is of the view that there remain many more unanswered questions about the ARP Growth Fund and Trio. Further, that there were a number of parties, including industry regulators, who failed to adequately carry out their designated responsibilities over the years during which these activities took place.

The Association strongly believes that it is in the public interest for a judicial light to be shone on all of the events which led to the collapse of the ARP Growth Fund so that these questions receive proper answers.

---

5 Media report. http://www.smh.com.au/business/from-caviar-to-porridge-20110722-1ht1a.html

6 Media report: http://www.smh.com.au/business/selfmanaged-super-and-the-trio-trap-20110116-19shf.html

The response of the ARP Association to the specific Terms of Reference for the Inquiry into the collapse of Trio Capital and other related matters

1. The type of investment vehicles, funds and other products involved in Trio Capital, and the relevant regulatory regime

From the perspective of the Association, the relevant investment vehicle involved with Trio was the ARP Growth Fund and the Association will focus its comments in this section on that fund and its various investments.

Trio (previously Astarra Capital Limited) was the Responsible Entity (**RE**) for the ARP Growth Fund. The ARP Growth Fund came into being on 1 July 2007 as a replacement for Professional Pensions PST (**PPPST**), which was a predecessor Pooled Superannuation Trust that was terminated by the Trustee on 29 June 2007. Astarra Capital was also the Trustee of PPPST. The PPPST was regulated by APRA under the *Superannuation (Industry) Supervision Act (**SIS**)* legislation.

The replacement ARP Growth Fund was set up as a MIS under ASIC regulation. Unit holders within the ARP Growth Fund operated self managed superannuation funds (**SMSF's**) which were directly regulated by the Australian Taxation Office (**ATO**). These SMSF's continued to operate under the general *SIS Act* legislative framework.

To effect the changeover from the PPPST to the ARP Growth Fund, Trio issued a Product Disclosure Statement (**PDS**) to PPPST unit holders inviting investment. The PDS identified PST as continuing in the role of investment manager for the ARP Growth Fund. PST had previously also operated as the administrator of the PPPST, with that role now transferring to Trio. Paul Gresham, a director of PST, wrote a letter[7] on 27 March 2007 to all unit holders "strongly recommending" that they transfer their interest in PPPST to the ARP Growth Fund.

Paul Gresham stated in the letter of 27 March 2007 that APRA had "reviewed" the operations of PST in December 2006 and as result "concluded that the Trustee, namely Astarra Capital Limited, should take over more of the day to day administration". The Association has not been able to obtain a copy of the December 2006 APRA review, but subsequent media reporting[8] has suggested that APRA were concerned enough with the operations and management of the PPPST, to force PST to make fundamental changes to its administration and structure. However, neither the PDS issued by Trio nor the Gresham letter of 27 March 2007 made any mention of such specific APRA concerns in relation to the formation of the ARP Growth Fund.

2. The points of failure in relation to product or advice

The Association is of the view that the ARP Growth Fund unit holders have suffered from a systemic failure in the provision of both appropriate advice and appropriate product, as currently operating under the aegis of the Australian financial services regulatory system.

There is a trail of evidence, based on hard copy documentation, which indicate that this may have occurred from as early as 2003 when Paul Gresham invited selected PPPST unit holders to participate in the financing of an investment, together with Wright Global Asset Management Pty Ltd (**WGAM**), into Tolhurst Capital Limited (**Tolhurst**). Tolhurst went on to change its name and become a new Australian funds management and superannuation administration business, Astarra Capital Limited, which in turn eventually became Trio.

should never have been allowed to act as directors of an organisation with an AFS licence. Cursory investigation by local regulatory bodies would have revealed that:

---

7 A copy of this letter is provided in Appendix 1.

8 Media report. http://www.smh.com.au/business/how-regulator-missed-chance-in-trio-debacle-20110704-1gz6a.html

- Shawn Richard (convicted in July 2011 in Sydney for dishonest conduct in relation to Trio) had been named as early as 2001 by overseas security regulators as an associate on an unlicensed stock broker in a "boiler room[9]" scam[10].

- Matthew Littauer is claimed to be have been a central figure in unlicensed broking operations. He was stabbed to death in 2004 in his office in Tokyo[11].

- was brought in to replace Littauer in the new operation[12]. It has been reported that evidence tendered in hearings in the NSW Supreme Court last year indicated that both Richard had fabricated their work records and lied about their qualifications.

- It is also claimed that both actually worked for Jack Flader, an overseas based lawyer who it is alleged is the actual mastermind behind the whole Trio fraud and is the actual owner of Trio.[13]

The same names (Richard, Bell, and Flader and others) appear regularly in the ARP Growth Fund/Trio saga. Their prior overseas track record should have precluded them from operating in positions of fiduciary responsibility in Australia[14]. The Association has a strong suspicion that the tie up with in late 2003 was the commencement of the first stage of what was apparently to eventuate as the wider Trio fraud. The ARP Growth Fund, and its predecessor fund PPPST, established its relationship with Astarra in 2004 and it is believed to have become a stepping stone in that fraud. The Association is consequently of the view that, based on the available evidence and media reports[15], this fraudulent outcome would likely not have occurred had the regulators concerned been carrying out their roles in a fully diligent manner.

The *Corporations Act 2001* requires people who carry on the business of providing financial services to hold an AFS licence (unless they are covered by an exemption or are authorised to provide those financial services as a representative of another person who holds an AFS licence). As will be seen below, Richard, Bell, Flader *et al* appear to have continued operating their criminal web for many years, amongst other things using the AFS licence system as a camouflage to cover their activities via their control over the very institutions which were set up to provide financial services regulatory protection for the public.

Examples over the years in question include:

- Trio was appointed the RE for ARP Growth Fund in 2007. Paul Gresham received Trio authorisation to operate the ARP Growth Fund as a MIS (Trio was the RE). Trio was in turn owned and controlled by Shawn Richard, and through him, ultimately by Jack Flader.

- PST (its director was Paul Gresham) was appointed by Trio in 2007 as the investment manager for the ARP Growth Fund.

- PST was in turn an Authorised Representative of Wright Global Investments (**WGI**). WGI had as its directors, at various times, Shawn Richard, Matthew Littauer and Jack Flader.

- Media reports indicate that the ARP Growth Fund ran at least two sets of accounts[16] (possibly three), giving totally different pictures of the performance of the ARP Growth Fund. The Association has cause to believe that the apparently fictitious "rosy" valuations of the ARP Growth Fund may have been supplied by to Trio, which accepted them without due checking.

---

9 A "boiler room " is a slang term for unlicensed stock broking firms that slip from country to country as they sell essentially worthless penny stocks by cold calling investors.

10 Media report. http://www.smh.com.au/business/trio-from-the-boiler-room-into-the-fire-20100101-llq3.html

11 Media report. http://www.smh.com.au/business/murder-intrigue-and-missing-millions-20100110-m0s1.html

12 Media report. http://www.brisbanetimes.com.au/business/cowboys-watched-as-millions-disappeared-20100718-10g1e.html

13 Media report. http://www.watoday.com.au/business/how-investors-in-trio-backed-the-wrong-horse-with-426-million-20100326-r369.html

14 Media report. http://www.smh.com.au/business/trio-from-the-boiler-room-into-the-fire-20100101-llq3.html

15 Media report. http://www.smh.com.au/business/how-regulator-missed-chance-in-trio-debacle-20110704-1qz6a.html

16 Media report. http://www.smh.com.au/business/selfmanaged-super-and-the-trio-trap-20110116-19shf.html

Shawn Richard has recently admitted in court in Sydney that he, acting on Jack Flader's instructions, was responsible for the transfer of investors' monies from a number of Trio managed funds, to overseas funds controlled by Flader. Richard's admissions in the enforceable undertaking (**EU**) that he entered into with ASIC reveal a trail of criminal activity[17], including that he used his position in Trio, WGI and related companies to arrange these transfers. (A more complete understanding of the history and relationships governing this matter can also be found in the recent EU entered into between ASIC and ex Trio CEO, Rex Phillpott[18]).

The Association is of the view that the ARP Growth Fund may well have suffered a similar fraud, which need never have occurred had the regulators and other gate keepers not failed in their duty to exercise proper diligence in the policing of the financial services environment.

2.1 Failure of the gate keepers

ASIC Chairman, Greg Medcraft, was quoted on 4 July 2011 in an ASIC media release[19] as saying (in relation to the Trio matter) that 'the responsibilities of directors and officers of responsible entities are not diminished through [outsourcing] ...ASIC will hold these gatekeepers to account."

The Association is of the view that the "gatekeepers" of the financial services regulatory system, Trio and WGI, failed to perform the roles intended for them by the relevant legislation in Australia. Indeed they appear to have deliberately connived in the creation of a fraud, using the legislative framework to camouflage their activities and to give the appearance to potential investors (unit holders of the ARP Growth Fund) that the arrangements met normal regulatory standards and safeguards. Refer also to the EU from Shawn Richard.[20]

Specifically, the Association believes that the following may have occurred:

- Trio issued a PDS in May 2007 to set up the new ARP Growth Fund, as a result of an earlier unsatisfactory December 2006 APRA review of PST. Trio would therefore have been fully aware of the concerns APRA had about the operations of PST (which APRA should also have made known to ASIC, being the new regulator of the ARP Growth Fund); and

2.2 Failure of the regulators.

The industry regulators, ASIC and APRA, also failed to exercise the appropriate standards of diligence expected of them. In addition to the points already raised previously in this submission, must be added a trail of "smoking guns" associated with key individuals, which should have triggered an early and close investigation of all companies associated with Shawn Richard and with PST.

Some examples:

- In 2005 APRA forced Shawn Richard off the Board of Trio due to conflicts of interest.

---

17 Media report http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/026113026.pdf/$file/026113026.pdf

18 See ASIC media release. http://www.asic.gov.au/asic/asic.nsf/byHeadline/11-133MR%20Former%20directors%20of%20Trio%20Capital%20prevented%20from%20working%20in%20financial%20services%20industry?opendocument

19 Media report http://www.asic.gov.au/asic/asic.nsf/byHeadline/11-133MR%20Former%20directors%20of%20Trio%20Capital%20prevented%20from%20working%20in%20financial%20services%20industry?opendocument

20 Richard EU.http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/026113026.pdf/$file/026113026.pdf

21 Media report http://www.investordaily.com.au/cps/rde/xchg/id/style/10855.htm?rdeCOQ=SID-0A3D9633-A684A22C

- In 2006 APRA investigated PST and, as a result the latter agreed to replace PPPST with the new ARP Growth Fund, a MIS under ASIC regulation[22].

- Paul Gresham told one ARP Growth Fund unit holder at the time that PST "no longer complied under APRA regulations".

- The Association has not seen the details of the APRA report of 2006 into PST, but it believes that it may contain evidence of unsatisfactory conduct on the part of PST, the details of which APRA should have passed onto ASIC.

- In 2008 ASIC interviewed Richard about a $500,000 secret payment from Trio to a financial planner.

- In 2008, APRA raised concerns about Trio's valuation of its hedge funds. Having being told by Trio that there was no "available valuation" information on two offshore hedge funds; APRA apparently took no further action until the fraudulent scam was exposed by a whistle blower in September 2009![23]

- It would also appear from media reports that ASIC did not properly monitor the appointment of appropriate directors to WGI, nor in its role as provider of proper authority to PST[24].

In short, it would appear that the two regulators did not act in a timely manner to follow up on suspect activities, nor did they share key information on target individuals and suspect organisations. Had they done so, the Association is of the view that the fraudulent activities associated with this group of individuals would have been stopped at an early stage, and the funds of the unit holders in the ARP Growth Fund protected.

3. The relationship between the SMSF arrangements and regulatory coverage

The unit holders who were invited by PST to invest in the ARP Growth Fund could only do so by way of being a SMSF. As pointed out in our response to item 1 above, these SMSF's were under the direct regulation of the ATO, whereas the ARP Growth Fund itself operated as a MIS under ASIC regulation. It is a strict requirement of the ATO that Trustees (i.e. Trio in the case of the ARP Growth Fund) enforce the proper SMSF compliance, reporting and independent auditing of individual funds.

In effect, the unit holders of the ARP Growth Fund were dependant, and relied on, the integrity and honesty of Trio in its role as the RE for ARP Growth Fund. Similarly, they had to rely on the integrity and honesty of Paul Gresham and PST as investment manager and AFS licensee representative of WGI. They felt they could take comfort from the fact that all three (Trio, PST and WGI) had their activities overseen by ASIC.

The Association believes that unit holders were entitled to rely on these protections and audit reports. Any robust regulatory process should have a proactive stance for those cases where there is a well grounded suspicion of unusual or fraudulent activity. As can be seen from items I and 2 above, this cloud of suspicion was certainly associated with the controlling entities of the ARP Growth Fund. Unfortunately the expected standards of diligence on the part of ASIC and APRA seem to have not been met.

The Association not only believes that the legislative safeguards failed to protect ARP Growth Fund unit holders, but also that they have acted to place SMSF's at a positive disadvantage, by excluding them from the normal compensation protections made available under *Part 23 SIS* to other "regulated" superannuation investors not set up as SMSF's.

---

22 Media report http://www.smh.com.au/business/how-regulator-missed-chance-in-trio-debacle-20110704-1qz6a.html

23 Media report http://www.smh.com.au/business/how-regulator-missed-chance-in-trio-debacle-20110704-1qz6a.html

24 Media report http://www.smh.com.au/business/murder-intrigue-and-missing-millions-20100110-m0s1.html

The Association endorses the words of Justice Garling, as we have previously quoted in the Executive Overview, as they are particularly relevant and underline our own concerns.

> *"Justice Garling said he did not understand the principle by which funds regulated by the Australian Prudential Regulation Authority could receive federal government compensation but self-managed superannuation funds could not.*
>
> *In the case of Trio, the former have received $55 million and the latter have received nothing.*
>
> *"So the principle is if you are bigger and regulated you get compensation ... if you are smaller and vulnerable you don't?" he asked Mr Payne [Anthony Payne SC, appearing for the Commonwealth DPP]."*[25]

The Association put in a detailed submission on 21 February 2011 to the Future of Financial Advice Options Paper, in response to an invitation from the Department of Treasury[26]. Contained in that submission the Association believes are several key points of public interest (relating to the part 23 SMSF exclusion) that are worth highlighting to this Parliamentary Joint Committee of Inquiry.

These are as follows:

- Following the *Wallis Inquiry* in 1997, the *Corporations Act* was amended by the *Financial Services Reform Act 2001* to establish a difference between the levels of consumer regulatory protection offered to retail and wholesale clients. Generally retail clients enjoy a higher level of consumer protection as they are deemed to be less well informed and therefore less well able to assess the risks involved in financial transactions.

- The one notable retail exception to this general principle appears to lie in the field of SMSF's in regard to the total exclusion of SMSF's from the consumer protection offered to the members of "regulated" superannuation funds under Part 23 *SIS Act.*

- The trustees of SMSF's are currently treated more like wholesale fund "professional investors", akin to the mostly professional trustees of large regulated superannuation funds, whereas they should in fact be regarded as less sophisticated retail clients.

- The Association questions the appropriateness of this exclusion of SMSF's from part 23 *SIS* regulatory protection and in particular the apparent total extent of its applicability. The Association believes it should be modified to better protect SMSF retail members in situations in which they are currently clearly suffering regulatory disadvantage when using licensed investment products.

- This would include those particular circumstances in which *regulated* retail (and wholesale) superannuation funds may qualify for consumer protection under part 23 *SIS,* yet SMSF retail clients accessing the same or similar licensed investment products under a similar set of circumstances are excluded from this protection.

This is, in the view of the Association, an unintended anomaly which needs to be addressed.
By so doing, the Association believes that the Federal Government will be able to better provide regulatory protection to the growing group of retail SMSF investors, in those specific circumstances where such additional protection is clearly warranted.

The Association believes that the great majority of SMSF's clearly fall into the retail category and should be entitled to the greater levels of regulatory protection enjoyed by such clients, in specified situations of fraudulent conduct or other criminal behaviour including theft.

---

25 Media report. http://www.smh.com.au/business/from-caviar-to-porridge-20110722-1ht1a.html

26 Association of ARP Unitholders Inc., "Submission to the Future of Financial Advice Options Paper", 21 February 2011. See Appendix 3.

3.1 Audit protection

The ARP Growth Fund unit holders also took comfort from the fact that there was in place a legally required process of active and independent audit to which Trio, PST and WGI were subject. In the case of the ARP Growth Fund the Compliance Auditors were KPMG Australia (**KPMG**), and the Financial Auditors were WHK (**WHK**). The PPB report of 18 May 2011 made mention of proposed investigations into both audit firms but the Association is not aware of the results of such an investigation. The Association is however aware that WHK refused to sign off on the ARP financial results for the financial year ending June 2009. Despite this, KPMG were prepared to sign off on the compliance audit, shortly prior to the collapse of all of the Trio funds.

The Association therefore believes that there are unanswered questions as to:

- The level of professional rigour and diligence displayed in the conduct of these audits, both in 2009 and in prior years.
- Why KPMG signed off on the compliance audit in late 2009 when WHK had earlier refused to sign off the financial audit.
- Why WHK refused to sign off the financial audit and to whom was this fact reported.
- When did WHK and/or KPMG first have any suspicions as to the veracity of the financial statements of any of the Trio managed funds?

The Association would point out that in recent cases ASIC has taken the lead in protecting the interests of investors by personally negotiating multi million dollar settlements with leading audit firms, the most recent being in the Westpoint settlement. Such an approach by ASIC would also appear to be warranted in the case of the ARP Growth Fund.

3.2 Custodian protection

"Superannuation funds custodians hold the assets and coordinate and keep track of the investment managers used by the superannuation fund. *Custodians who perform their duties act as an important check for such funds because they help insulate the fund from fraud and dubious investment transactions*"[27].

The custodian of the ARP Growth Fund was National Australian Trustees Limited (**NATL**), a subsidiary of the National Australia Bank (**NAB**). The ARP Growth Fund unit holders took comfort from the fact that the NAB brand was actively protecting the fund from both fraud and dubious investments. However in the PPB report to unit holders of 18 May 2011, NATL was identified by PPB as being the subject of investigation for a range of possible offences.

The Association is of the view that NATL needs to be further investigated to ascertain whether it has properly acted to insulate the ARP Growth Fund from fraud and dubious investment transactions. In particular, the Association would like clarity as to who authorised the transaction to transfer $40 - $50 million of ARP Growth Fund assets overseas, and whether they were properly authorised to do so.

4. The role of ASIC in monitoring Trio Capital and any subsequent pursuit of directors, advisors and fund managers

Trio was the RE for the ARP Growth Fund. ASIC was in turn accountable to monitor and regulate the performance of Trio. The ARP Growth Fund unit holders can only conclude that, based on the now published EU which ASIC has obtained from the former Trio CEO, Rex Phillpott[28], that ASIC is unwilling or unable (or both) to prosecute Trio directors and officers for serious and admitted braches of Corporations Law.

---

27 Selecting Super: http://www.selectingsuper.com.au/_2006_SSHB_Make_sense_of_who_runs_your_super_fund.html

28 ASIC Media Release 11-133 "Former directors of Trio Capital prevented from working in financial services industry" 4 July 2011 (**ASIC MR 11-133**). Rex John Phillpott, was the CEO, director and secretary of Trio from October 2005, and a member of Trio's Risk and Compliance Committee while Natasha Beck was a non-executive director of Trio from June 2008 and a member of the investment committee of Trio from September 2009.

The Phillpott EU clearly indicates failure to carry out the RE fiduciary functions in a proper and honest manner, and upon which the ARP Growth Fund investors had a right to rely. Equally, the EU's recently obtained by ASIC from the former chairman and director of Trio, David Andrews, and the non executive director Natasha Beck, tell a similar story[29].

Under section 1 of the *Australian Securities and Investments Commission Act* 2001, ASIC is charged with the statutory responsibility to perform its functions and to exercise its powers so as to, among other things:

> *"promote the confident and informed participation of investors and consumers in the financial system".*

It is the view of the Association that there have been gaps in ASIC's performance of this statutory responsibility and that, while ASIC is now enforcing the law and pursuing (to some degree) those involved, its actions have come too late and failed to protect adequately the interests of the unit holders in the ARP Growth Fund.

The EU with Phillpott sets out the following chronology of ASIC's investigations into Trio:

- 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;
- on 16 October 2009, ASIC issued an interim stop order on Trio preventing offers, issues, sales or transfers of interests in the Astarra Strategic Fund and certain other MISs for which Trio was the responsible entity.
- on 16 December 2009, Trio was placed into voluntary administrataion and APRA suspended Trio as trustee of the superannuation funds; and
- on 17 December 2009, ASIC suspended Trio's AFSL but allowed the licence to continue for certain limited purposes[30].

The EU goes on to list the "issues of concern" identified by ASIC as to whether Trio's officers "had discharged their duties as officers of a responsible entity"[31]. In the case of Phillpott, these concerns relate to matters including:

- failing to take all steps a reasonable person would take, if they were in the officer's position, to ensure that the responsibile entity complied with the *Corporations Act*, the constitution of the MIS, and the compliance plan of the MIS;
- failing to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
- failing to act in the best interests of members of the MIS, and if there is a conflict between the member's interests and the interests of Trio, give prioirity to the member's interests[32].

The EU lists a number of specific issues dealing with Phillpott's role in the arrangements including Philpott's role in implementing a series of transactions notwithstanding Phillpott's awareness that there were liquidity problems, that no independent valuation had been obtained and that no due diligence inquiries had been made about why the transaction was necessary[33].

In the EU, Phillpott expressly acknowledges that ASIC had reason to be concerned as to the alleged facts[34]. The media release from ASIC contains the following statement:

---

30 Paragraphs 7.1 to 7.4, Enforceable Undertaking offered by Rex John Phillpott to ASIC under section 93AA of the *Australian Securities and Investments Commission Act* 2001 (the **Phillpott EU**).

31 Paragraph 8.1, Phillpott EU.

32 Paragraph 8.2, Phillpott EU.

33 Paragraphs 8.3 – 8.28, Phillpott EU.

34 Paragraph 11.3, Phillpott EU.

"Soon after ASIC commenced its investigation into Trio Capital, the Australian Prudential Regulation Authority (APRA) commenced a concurrent investigation. Both agencies have been cooperating with each other with respect to their investigations. Investigations by both agencies are continuing."[35]

The concern of the Association is that:

- as set out at great length in the EU (and as summarised above), ASIC's investigation identified numerous "issues of concern" with the management of Trio; and yet

- as acknowledged in its media release, ASIC and APRA commenced their co-operation only *after* the fraud had been completed. By this time the assets of the ARP Growth Fund and the other funds had already been transferred overseas and disbursed.

Noting that a number of irregularities were identified by APRA as far back as 2006, the Association must ask whether, if APRA and ASIC had better co-ordinated their regulatory oversight, this fraud could have been identified earlier thereby limiting the loss suffered by the ARP Growth Fund unit holders and members of the other MISs.

5. The APRA regulatory relationship to Trio Capital and the use of SMSF

Under section 8 of the *Australian Prudential Regulation Authority Act* 1998, APRA is charged with the statutory responsibility to perform its functions and to exercise its powers so as to, among other things:

"balance the objectives of financial safety and efficiency . . . and . . . to promote financial system stability in Australia."

Whilst APRA has had no direct supervisory role in connection with the ARP Growth Fund since mid 2007, the Association has elsewhere in this submission highlighted APRA's earlier role as the regulator of Trio, when the latter was trustee of the PPPST. The results of the 2006 APRA "review" of PST have never been made public but the transfer of the PPARP assets into a MIS, without any apparent communication with ASIC, is of great concern to the Association. The Association consequently would like this Parliamentary Committee to obtain and examine the report of the 2006 APRA review into PST.

As pointed out elsewhere in this submission, APRA appears to have been ineffective in following through in its dealings with Trio:

- In October 2008 it unsuccessfully sought further information about the valuation of the Trio funds, apparently being satisfied with the Trio response that there was no "available valuations" of two offshore hedge funds. Instead of seeing a red light, APRA took no action against Trio at all.[36]

- In 2005 APRA did take action by forcing Shawn Richard off the Board of Trio because of conflict-of-interest concerns, but allowed Richard to continue with all of his other (now infamous) activities[37].

At the very least, it appears to this Association that APRA has not acted diligently to follow up on important matters and has ignored clear warning signals. Had it done otherwise, the current situation with both Trio and the ARP Growth Fund could well have been avoided.

---

35 ASIC MR 11-133.

36 http://www.smh.com.au/business/how-regulator-missed-chance-in-trio-debacle-20110704-1gz6a.html

37 http://www.smh.com.au/business/how-regulator-missed-chance-in-trio-debacle-20110704-1gz6a.html

6. The access to compensation and insurance for Trio Capital investors including in circumstances of fraud

6.1 Compensation under Part 23 *SIS Act*

Access to compensation under Part 23 *SIS* has been denied to the ARP Growth Fund unit holders on the basis that they are SMSF's. The Association has highlighted under item 3 above its concerns at the manifest shortcomings, and investor injustice, that this decision represents.

6.2 Compensation under the CDDA Scheme

The CDDA Scheme[38] is an administrative scheme set up to enable Commonwealth agencies to compensate persons who have suffered detriment as a result of an agency's "defective" actions or inaction, and who have no other avenues of redress. The CDDA scheme applies only to Australian Government agencies that are subject to the *Financial Management and Accountability Act 1997.* This includes the activities of both ASIC and APRA. The CDDA scheme is an administrative scheme that allows Australian Government agencies to provide compensation when there is a moral rather than a legal obligation to do so.

To come within the Scheme, the alleged action or omission by ASIC and/or APRA must meet the definition of "defective administration". On its website, the Department of Finance and Deregulation (**DFD**) defines "defective administration" as:

- a specific and unreasonable lapse in complying with existing administrative procedures; or
- an unreasonable failure to institute appropriate administrative procedures; or
- an unreasonable failure to give to (or for) an applicant, the proper advice that was within the officer's power and knowledge to give (or reasonably capable of being obtained by the officer to give); or
- giving advice to (or for) an applicant that was, in all the circumstances, incorrect or ambiguous."[39]

The Association is unaware of any compensation payments being made under CDDA in circumstances similar to those of Trio or the ARP Growth Fund, but is of the belief that a strong case exists for the consideration of such a compensatory payment to SMSF's affected by the Trio fraud. The Association is of the view that the actions of officers within both APRA and ASIC constitute a failure by those officers that was unreasonable in the circumstances and was contrary to the standards of diligence expected of those agencies.

The guidelines issued by the Commonwealth Ombudsman set out the principles that government officials should observe when considering claims under the CDDA scheme. These include:

"Once a decision is made to treat a claim as a CDDA matter, it should not be handled in the same way as a legal dispute. Decision makers need to remember:

- there is no onus on a CDDA applicant to prove their claim as they would need to prove a legal claim;
- in determining a CDDA claim, all relevant information which is readily available should be considered, even if the applicant has not provided it;
- a CDDA claim is to be considered from the perspective of a moral obligation and should not involve a 'compensation minimisation' approach;
- if the staff handling CDDA claims are located in an agency's legal area or if the agency uses external legal advisers, it should be made clear to all involved, including the applicant, that the matter is not being dealt with as a legal dispute; and
- a CDDA claim should ordinarily be granted where the material before the decision maker provides a reasonable and proper basis for compensation to be paid—legal concepts and terms such as

---

38 *Scheme for Compensation for Detriment caused by Defective Administration (**CDDA**)*

39 See also paragraphs 25 – 30 of Finance Circular No 2009/09 (**FC 2009/09**) issued by the DFD.

'balance of probabilities', 'contributory negligence' and 'conclusive grounds' should be avoided."[40]

As noted above, the view of the Association is that there is a strong basis to conclude that, among other things, the failure of APRA and ASIC to co-ordinate their regulatory oversight of Trio[41], in the face of warning signs that should have been apparent, amounts to defective administration by those agencies. The Association is of the view that the actions of officers within both APRA and ASIC constitute a failure by those officers that was unreasonable in the circumstances and was contrary to the standards of diligence expected of those agencies.

At an absolute minimum, there is a moral obligation to provide unit holders with full compensation.

6.3 Insurance compensation

Avenues of compensation via insurance have been suggested, but in practice these are extremely difficult to access and are unlikely to deliver a satisfactory compensation outcome for the ARP Growth Fund, as spelled out in the Association's submission of 22 May 2011 to the recent Richard St. John Consultation Paper for the Statutory Compensation Review (Future of Financial Advice Inquiry)[42].

The Association's view on insurance are formed as a result of the following factors:

6.3.1 Insurance as a means of compensation is deficient, particularly under catastrophic situations

Professional indemnity insurance as a means to compensate complainants has failed in the case of the ARP Growth Fund members. The insurance cover and arrangements in place for Trio have been inadequate to even begin to satisfy the number of claimants and the quantum of funds lost. This fact is also true of PI cover in place in the supply chain leading to Trio. That is, at the Dealer Group level (Wright Global Investments Pty Ltd in liquidation) and at the adviser/investment manager level (PST Management Pty Ltd in liquidation).

For example, PST held PI cover of $5 million, which is less than 10% of the assets "lost". Wright Global Investments Pty Ltd held a similar amount of PI cover. Putting aside the difficulty and legal expense of recovering under such a policy, the quantum available means that no substantive level of compensation for loss is possible, even if a legal action is successful.

This situation is made more difficult by the tendency of groups caught up in these situations to go into liquidation, as has now happened not only with Trio but also PST and Wright Global. This means that any monetary compensation has to be directed towards the PI insurer only, as the licensee is no longer in a position to meet the liability.

In the case of the unit holders of the ARP Growth Fund, where the average client assets under management was in excess of $750,000, the lack of compensation is compounded by the fact that for many this amounts to a financial wipe out of their entire superannuation fund. For most ARP investors, these funds represent the fruits of two or three decades of disciplined savings under the Federal Governments superannuation framework. As many are pensioners of advanced age, this means that they have been reduced to levels of near poverty at a time when their capacity to return to the workforce is well nigh non existent.

6.3.2 Run-off cover is seldom in place

In the case of the ARP Growth Fund unit holders, great uncertainty as to what exactly was happening with unit holder funds existed for many months and was not clarified until well after the PI cover was no longer in place. There was no opportunity to even lodge claims at this point, should a unit holder have wished to do so.

---

40 See http://www.ombudsman.gov.au/docs/fact-sheets/FactSheet9_CDDA.pdf, page 2

41 As acknowledged by ASIC in MR 11-133.

42 See appendix 4.

6.3.3 Insurance caps need to be realistic if it is to deal with a catastrophic occurrence

PI insurance needs to be able to deal with situations such as the ARP Growth Fund, but is currently not well set up to do so. PI cover is unsuited to respond to situations where multiple large claims arise, which means that the aggregate quantum exceeds even large cap amounts. This situation is made worse when the licensees are unable to meet the excess from their own financial resources.

6.3.4 Liquidators are reluctant to pursue insurance claims in catastrophe situations

Liquidators have the right to pursue claims on behalf of claimants in cases where the licensee becomes insolvent, but in the case of the ARP Growth Fund this has been found to be largely academic as the liquidator faces a real life situation where not only do the amounts claimed overwhelm the PI cover, but their own fees are no longer guaranteed due to the fact that the fund has no value. They are therefore reluctant to act, as this will incur additional expenses for them which they are unlikely to recover.

6.3.6 Policy conditions and exclusions need to be publically available

Claimants and potential claimants in catastrophic situations often find themselves in desperate situations. In the case of ARP Growth Fund members, all principal parties who carry PI cover are in liquidation, the liquidators have no or limited funding to act on the behalf of claimants, and the potential claimants themselves have much reduced financial circumstances.

Engaging expensive legal advice under these circumstances is an uncertain and limited option. The uncertainty is however much worsened by the refusal of PI insurers to make available to claimants the policy conditions governing the specific PI policy, so that they have no way of knowing what their rights may be unless they launch expensive legal action.

Pursuing PI compensation under such circumstances becomes well nigh impossible and direct action to access compensation by ASIC on behalf of those affected may become the only viable option (as in the case of Westpoint). The Association is of the view that the ARP Growth Fund situation is such that it not only merits such an approach by ASIC, but that it is in the public interest for this to occur.

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

Fraudulent and deceptive behaviour appears to lie at the very heart of the Trio matter. For ARP Growth Fund, the issues of domestic and international and domestic fraud may both be relevant.

7.1 Internationally

- Internationally, in the case of Trio as RE, the ARP Growth Fund unit holders lost funds invested into Astarra Strategic Fund (**ASF**) as a direct result of Trio behaviour.

- The Association is of the view that, upon further proper investigation, it is highly likely that the PPARP investment of the ARP Growth Fund will also result in a finding that it is an international fraud similar to that of ASF. As in the case of ASF, this is likely to be as a result of the behaviour of Trio related entities, with the connivance of

- PPB reported to the ARP Growth Fund unit holders on 18 May 2010 that the total exposure of the ARP Growth Fund to PPARP was approximately $53 million, but assessed its current value at that time as effectively being nil. The ARP Growth Fund owned 100% of the shares in PPARP, which is a British Virgin Island registered company with funds invested with Empyreal SPC Limited (**Empyrea**l). The underlying assets with Empyreal are a derivative swap agreement with JP Morgan Markets (**JP Morgan**).

- The Association holds the view that the nature of the JP Morgan swap agreement needs to be fully investigated, as after nearly two years neither PPB nor ASIC are able to give any definite indication as to whether or not there is still any residual value in that agreement.

- One unit holder of the ARP Growth Fund reports that he contacted Paul Gresham in early 2008, requesting more information on the performance of PPARP. As a result, he was forwarded monthly reports which showed that PPARP had a valuation of $50 million plus as late as September 2009. However a March 2011 report from PPB indicates that Empyreal balance sheets were reporting the value of PPARP as being around $8 million at December 2009.

- The Association knows of no reason as to why there is a $40 million plus difference in the values over the three month period. Media and other reports indicate that the ARP Growth Fund may have kept several "books"[43]. It is further reported that documentation from Fortis Prime Solutions (Asia) Limited (**Fortis**) shows earlier significantly large write downs as early as 2007 ($18 million) and again in 2008 ($ 25 million).

- It would seem to the Association logical that Empyreal, who were managing the PPARP investment, would be aware of any such write downs, as would Trio as the RE and also Paul Gresham as PST director. Where exactly the truth lies is still unclear, but it certainly deserves further investigation.

7.2 Domestically

- Domestically, it would also seem

- In addition to the PPARP and ASF investments, the ARP Growth Fund had several smaller investments and loans, all of which would appear to now have nil value for unit holders. These include Ualan Property Trust [$2.076million], Astarra Asset Management Pty Limited **(AAM)** [$1.5 million] and Secare Health Centre Pty Ltd [$1.0 million].

-

In the face of a plethora of apparently fraudulent behaviour, it is not difficult to understand why the Association and the ARP Growth Fund unit holders believe that they have good reason to suspect that they have been defrauded. What they find more difficult to understand is how it was apparently allowed to continue for an extended period under the noses of the regulators, and why to date no-one has even been charged over their ARP Growth Fund related activities.

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

The Association is strongly of the view that the protections available to superannuation investors using SMSF's are both inadequate and deficient in circumstances such as that of Trio. Our comments under item 3 of this submission are relevant and need to be read here as well.

Currently only the trustee of an APRA regulated superannuation fund can apply to the Minister for a grant of financial assistance, if the fund suffers an "eligible loss" as the result of fraudulent conduct or theft. The same legislation specifically excludes the trustees of SMSF's, regulated by the Australian Tax Office, from applying for similar assistance, even under circumstances which are identical.

---

[43] http://www.smh.com.au/business/selfmanaged-super-and-the-trio-trap-20110116-19shf.html

The Association believes that this outcome was never the intended outcome of the *2003 Review into Part 23 of the SIS Act (1993)*. The general philosophy underpinning the prudential regulation of superannuation is that the trustee of a superannuation fund bears primary responsibility for the fund's prudent operation. Nevertheless, recognising the importance of financial stability, the Government also applies an additional layer of prudential regulation to promote sound risk management. Furthermore, it is recognised in the *SIS Act* that in the case of fraud or theft that there is a case for Government intervention to provide compensation, in particular under part 23.

The exclusion of SMSF's from the part 23 protection was originally justified on the grounds that the SMSF trustees are also fund members. It was therefore assumed that the trustee(s) will act in their own best interest and that as a result "members do not need the full range of statutory measures to protect them in relation to the conduct of the trustee" (*Review page 4*). While there may be some logic to this approach, it also carries clear limitations.

The Association is of the view that this exclusion operates unduly harshly against the members of SMSF's under certain circumstances and needs to be amended to provide them with greater regulatory protection. The Trio circumstances relating to ASF clearly demonstrate that the SMSF trustees acted in equal good faith and to the same standards as did the professional trustees of the regulated superannuation funds.

The trustees of both types of funds formed their decision to invest in the same licensed investment product, based upon information provided from similar documentation, using a PDS format approved by the regulator. Both sets of trustees clearly formed the view that, based upon the information provided in those documents, it was in their members' interest to invest in the Trio managed ASF. Yet when it turned out that ASF investors had all been subject to the same complicated deception and fraud, only the members of one group had an avenue of appeal open to them under part 23, namely those under APRA "regulated" funds.

It is the view of the Association that the ARP Growth Fund investment in PPARP, when properly investigated is likely to have been subject to a similar fraud as occurred to ASF and that the investors in that fund should be similarly compensated. The Association believes that all trustees should feel confident to invest their assets in properly licensed financial products issued within Australia, regardless of whether they are APRA regulated or SMSF's. The Association is *not* suggesting that the wide discretion available to trustees of SMSF's to invest in un licensed products or assets groups should be curtailed, nor that part 23 *SIS* compensation should apply when they do invest in unlicensed products or asset types,

The Association strongly supports the sentiments expressed by Justice Garling (refer Executive Overview) on this issue. In a post GFC environment in which improved investor protection is a stated Federal Government priority, it is no longer possible to justify the discriminatory treatment suffered by members of SMSF's such as outlined above.

The Minister for Financial Services and Superannuation, in his response to the Cooper Review, has promised to provide superannuation members with improved levels of regulatory protection. This is clearly a case where such improved protection is required.

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

Retail investors and SMSF's are usually generalists rather than professional investment specialists. They need to draw heavily upon the advice and information provided by sources that they can regard as being fully reliable. They are also generally not in a position to differentiate between parties who carry such a licence from the industry regulators. While it can be expected that professional investors and professional trustees will have a greater level of understanding as to the extent and limitations of the regulatory process, as well as the nature and extent of liability cover available, this cannot be expected of retail investors and SMSF's.

In the case of the ARP Growth Fund, the unit holders relied totally on the information and advice they received from parties such as Trio and PST. It is therefore indeed somewhat ironic that the mainly

professional trustees of the regulated superannuation funds received Federal Government compensation in the case of the ASF Trio fraud, whilst this has been denied to the SMSF's.

10. The role of ratings agencies and research organisations in product promotion and confidence

The Association does not believe that the ARP Growth Fund unit holders have been influenced by ratings agencies. It is however a point for future consideration that it may be useful if they were to more closely monitor the performance and compliance of entities acting in the public domain, such as Trio.

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

The Association believes that the key issues and important relevant matters pertaining to the Trio fraud are fully covered in our responses to the various Terms of Reference answered above.

11.1 Impact statements

The impacts which these matters have had on the lives of ordinary Australians caught up in the outcomes has been significant. The Association has attached to this submission the impact statements of a number of ARP Growth Fund unit holders. In these statements they tell, in their own words, the distress and misery which they and their loved ones have been caused and which are typical of the impacts this likely fraud has had on the lives of many unit holders in the ARP Growth Fund.

11.2 Public interest

It is clear from the Association's submission that there are many as yet unanswered questions relating to the demise of the ARP Growth Fund. The Association believes that it would be in the public interest to have these issues properly resolved, as they go to very core of the operation of our financial services system. Unless this is done in a totally open and transparent manner, the Association is of the view that the ARP Growth Fund situation will fester and that media and public interest in it will continue.

11.3. Recommendations

The Association would therefore like to see the Parliamentary Joint Committee consider one or more (or all) of the following five recommendations for further action:

1. The establishment of an independent judicial inquiry into the causes of the ARP Growth Fund collapse, including the role played by custodians, auditors (both financial and compliance), directors, investment and compliance committees, trustees and responsible entities, and Federal Government regulators (APRA and ASIC).The reason for such a judicial inquiry would be to restore public confidence in the retail superannuation arena.

   Such an inquiry would also help to ascertain whether the trail of events and apparent criminal and fraudulent activity by key individuals, plus the lack of due diligence on the part of Federal Government regulators, provides the evidence for a civil compensation class action by unit holders in ARP Growth Fund (and others.)

   The Association believes there a number of people who can assist both this Inquiry, and any subsequent judicial inquiry, with further information.

   And/or

2. ASIC be instructed by the Federal Government to itself directly pursue and fund action, including through PPB, on behalf of the ARP Growth Fund unit holders (as it did in the case of Westpoint, Storm Financial and other recent cases of financial malfeasance), and to directly pursue all parties whose actions, or inaction, may have contributed to the likely ARP Growth Fund collapse.

And/or

3. Pay compensation under the CDDA Scheme to the unit holders in the ARP Growth Fund, recognising that these unit holders have suffered severe detriment as a result of the defective administration, actions and omissions on the part of both APRA and ASIC. The Association believes that these agencies exhibited an unreasonable failure to institute appropriate procedures, which constituted a failure on their part which was unreasonable in the circumstances and was contrary to the standards of diligence expected of those agencies.

   The Association believes that there is an absolute moral obligation on the part of ASIC and APRA to provide the ARP Growth Fund unit holders with full compensation for their losses.

   And/or

4. The *SIS Act* legislation be amended provide for part 23 compensation to be made available to all SMSF's, where they suffer a loss due to fraud or theft. This SMSF protection should only apply where the SMSF's invest in products licensed by ASIC. This may include the need for the introduction of a levy arrangement for SMSF's, on a basis similar to that which currently applies to regulated superannuation funds, or via a levy on the providers of the ASIC licensed products.

   The Association believes that if the above *SIS Act* amendments were enacted, that there is a strong case for a one off retrospective payment to be made to the ARP Growth Fund unit holders. Their circumstances have been the lightning rod which has highlighted the need for such additional investor protection. There is little likelihood that other similar retrospective claims will be mounted.

   And/or

5. Review current Professional Indemnity insurance arrangements and cover to provide a more realistic level of cover in cases of fraud (Refer the discussion in item 6 above).

Appendices

2. **Impact Statements.** Three impact statements from selected unit holders in the ARP Growth Fund.
   i. Julia Fellows (with Jacqueline Fellows)
   ii. Dorothy and Peter Logan
   iii. Lorna Tomkinson (with Christopher Tomkinson)
   iv. ARP Growth Fund Member Survey

3. **Submission to the Future of Financial Advice Options Paper.** 21 February 2011.

4. **Submission to the Statutory Compensation Review (Future of Financial Advice).** 22 May 2011. (In response to the Consultation Paper prepared by Richard St. John)

5. **Chronology.** Chronology of the key events in the collapse of the ARP Growth Fund.

Appendix 2.

Impact statements. Statements from three unit holders of the ARP Growth Fund

2.1 Julia Fellows (with Jacqueline Fellows)

Inquiry into the Collapse of Trio Capital

I am writing this submission on behalf of my mother, Jacqueline Marie Fellows, and myself as the Trustees of Money Hill House Investment Provident Fund and Unit Holder of the ARP Growth Fund ARSN 112 315 036.

When my late husband, William John Stelmach, and I first started to discuss his retirement, which he planned to achieve when he reached 63 years of age, we went to see Mr Paul Anthony Gresham, whom my husband had met through Mr Gresham's involvement in the management of the corporate employer superannuation fund, of which my husband was then a member. My husband informed me that Mr Gresham said that he could assist us with advice on how best to save for our retirement and manage our investments.

Acting upon the advice of Mr Gresham, my husband and I established our Fund in January 1997 as the superannuation fund for our retirement. We thought that Mr Gresham's advice made good sense for us – we would have our own self-managed superannuation fund so that he could ensure that our investments were appropriately tailored to our particular needs, but we would be part of a pooled superannuation fund so that we could benefit from the economies of scale of a much larger investment pool and the security associated with being a part of a larger pooled fund.

Initially there were three trustees of Money Hill House Investment Provident Fund, my husband and I and Mr Gresham. Corporate Pension Planning, run by Mr Gresham, managed our Fund for us in the pooled superannuation trust, which he had established in October 1984.The Trustee of the superannuation investment pool was the Trust Company of Australia Ltd and PST Management Pty Ltd, Mr Gresham's company, was the administrator.

At all times, Mr Gresham knew that we were saving to provide ourselves with an adequate income to be self sufficient in retirement. As my husband and I had both worked extremely hard all our lives and had been fortunate enough to be professionally successful, we planned to enjoy our retirement years together and travel extensively. Accordingly, we knew that we had to ensure that we had an adequate income stream in our post working lives to enable us to fulfil our dreams. Thus, we always made it clear to Mr Gresham that we were more concerned about protecting our capital in a bear market, than achieving significant gains in a bull market. We were conservative investors whose focus was on good risk management, rather than stellar investment results. We were satisfied that Mr Gresham clearly understood our wishes in this regard and would comply with them.

Unfortunately, neither my husband nor I were particularly knowledgeable at that time about complicated investment matters and so we put a high degree of trust in Mr Gresham as our investment manager. We had established our self-managed superannuation fund not as a vehicle to give us any direct control over our investments, given our lack of expertise in this area, but as a means of consolidating our superannuation contributions into a single scheme, with investments customised by Mr Gresham to best meet our long term goal of self-sufficiency. We also thought it would make life easier for us in the unwelcome event that one of us died and the other partner was left to live on the income from our fund.

Over time, as Mr Gresham informed us of more and more changes that were being made to the structure of the pooled superannuation fund (of which our self-managed fund was a part) and the various entities responsible for it, our understanding of what had initially been a simple model for the operation of Money Hill House Investment Provident Fund diminished, with the increasing complexity and change. However, we remained comforted by Mr Gresham's assurances of 'an incredible amount of due diligence' being carried out on each of the investment managers and our level of protection through significant diversification of the investments. We believed that such diversification of investments was a sound approach so that, in a worst case scenario, we could never lose all our investments, if any one fund manager ran into difficulties.

We were perplexed by the decision to restructure the pooled superannuation fund into a managed investment scheme to be regulated by ASIC rather than APRA. However, we believed that ASIC would apply at least the same degree of scrutiny to the MIS, as APRA to the pooled fund, so put our faith in the rigour of the regulator's oversight to ensure that no breaches of the law would occur. As Mr Gresham strongly recommended this course of action, we did not object to the restructure, given that he was remaining as the investment manager of the Fund in his capacity as PST Management Pty Ltd.

We received regular information from Mr Gresham about the performance of our investments against relevant benchmarks and were quite content with the advice. When the ARP Growth Fund was established, we read the Product Disclosure Statement which was sent to us and satisfied ourselves – to the extent that we were able, given the highly technical information contained therein - that the Fund was to be prudently managed in the sole interests of its members. We specifically noted that there was no mention of leveraged investing in the document, as we were strongly opposed to such a practice, given our low risk appetite.

Our first concern about the health of our Fund occurred when we received correspondence from Mr Gresham, dated 9 May 2008, that Empyreal Investments Pty Ltd, the investment manager of PPARP Ltd and Empyreal SPC Ltd, had advised that there would be a delay in calculating the March 31st share price of both funds. We thought this seemed rather strange. However, it was not until we received a letter from Mr Gresham, dated 3 June 2008 regarding the PPARP Ltd share price, that we were dismayed to learn that the Fund had been borrowing money to buy investments for the pooled superannuation fund. We could not understand how ASIC could have allowed this to happen, if it were monitoring the operation of the Fund.

When ASIC placed an Interim Order on Trio Capital Ltd in October 2009, preventing investors in the Astarra Strategic Fund from withdrawing funds, Mr Gresham assured us that the ARP Growth Fund only had $1 million invested in ASF and that, apart from this small exposure, there were no problems whatsoever with the ARP Growth Fund. That was the last communication we had with Mr Gresham.

When we finally comprehended the true situation and the devastating impact it would have on our life savings, my husband and I were both completely mortified by the betrayal that we had suffered. Within months my husband was diagnosed with pancreatic cancer and died in March 2010.

Since October 2009, I have not had any access to the funds that we had invested in Money Hill House Investment Provident Fund. My husband's estate contained virtually no money as all our savings had been channelled into our superannuation fund. Hence, there was no legacy for his three children.

It has been almost two years since ASIC identified that there were major irregularities with the ARP Growth Fund and yet no action has been taken in that time to pursue recovery of our superannuation funds or to seek any compensation for us through whatever means available. I find this lack of action reprehensible, given the financial suffering of all members of the ARP Growth Fund.

Given that my husband and I were only seeking to provide for a retirement with dignity, but had put all our 'eggs in the one basket' in our superannuation fund, including partially rolling over my husband's Victorian State Superannuation lump sum and my former employer superannuation funds and redundancy payments, the collapse of Trio Capital has had a devastating impact on my life and was clearly a major contributor to my husband's death.

Neither my husband nor I ever comprehended that there was less regulatory protection for self-managed funds in pooled investment arrangements than for individual superannuation accounts in industry, corporate or retail funds. Given our conservative approach, we would never have gone down the self-managed path if we had understood that this type of superannuation savings vehicle was not regarded by the Federal Government as deserving of the same safety net protection as other types of superannuation savings arrangements. This fact had never been made known to us – there had been no warning from the Government or the regulators that you invest, however prudently, in your own self-managed fund at your peril. In the event that you are the victim of fraud through absolutely no fault of your own - unlike the rest of the community's superannuation savings – your superannuation

savings have no protection whatsoever. This seems contrary to Australia's proud international reputation as a country with guaranteed protection for all superannuation savings. Indeed, it seems incomprehensible to me that the Government would facilitate the establishment of SMSF arrangements to encourage the self funding of retirement, without putting in place the necessary regulatory protection to afford such arrangements security in the event of fraud.

In conclusion, I would request that the Inquiry give consideration to recommending the retrospective extension of the underpinning protection for superannuation savings in self-managed superannuation funds, affected by the collapse of Trio Capital, as enjoyed by other fund members similarly impact by the Trio collapse, where the SMSF members genuinely believed that their investments were being prudently managed, but nonetheless were subject to fraudulent behaviour, which saw them lose their entire retirement savings.

Julia Fellows

7 August 2011

Inquiry into the collapse of Trio Capital and related matters

- Peter's superannuation was placed with Paul Gresham some time in the late 1970's to early 1980's by his employer, TNT Management Limited, before superannuation contributions became obligatory by law. It was considered an extra addition to his salary package, instead of part of his disposable income.

- Peter did not choose Paul Gresham as custodian of his superannuation payments - TNT Management Limited did.

- Paul Gresham then continued to manage Peter's superannuation fund for almost the next 30 years. In that time, we generally received above average returns when compared with our other small funds. Throughout the years, we enjoyed the highs and rode out the lows to achieve an overall balance in the fund. At no time did Paul give us any reason not to trust his advice or question his judgement. His successful record spoke for itself; otherwise we would not have remained as his clients.

- We also expected the auditors to fulfil their protective role as "watch dogs" and therefore provide an additional level of security for our superannuation. There were other reassuring balances and checks in place.

- On the advice of our accountant, the superannuation fund was converted to LPD Pension Fund when Peter retired in 1994. Further superannuation money was added to this fund, as Peter did contracting work for a short time after he retired.

- Legislative change in 2000 decreed that superannuation funds with less than 5 members must become a SMSF - money until then had been in a pooled fund. The implications of this legislation were not explained either verbally or in writing by Paul Gresham. Nor did the government widely publicise what this change would mean to superannuants. There was no suggestion from anyone that conditions governing our superannuation had drastically changed as a result of this legislation.

- In April 2004, Paul Gresham/PST Management Pty Limited wrote to us saying that it had been decided to replace Maple Brown Abbott as the Manager of the balanced growth division, with at least 10 new fund managers appointed to manage Absolute Return Portfolio (ARP).

- Yet again, we trusted Paul Gresham's judgement, as by using his past investment history as our benchmark, we had no reason to be concerned by these changes or that the investment was not a solid one. At no time over the years, did Paul Gresham go into great detail as to what the products actually were - he would just advise a particular course of investment he was going to take.

- On 11 June 2004, the Trust Company, Superannuation Services Limited, retired as the Trustee of Professional Pensions PST and was replaced by Astarra Capital Limited.

- In December 2006, following a review by APRA, it was decided by the Trustee (Astarra Capital Limited) that the Fund should be restructured as an MIS because both The Trustee Astarra Capital, and Paul Gresham agreed that Pooled Superannuation Trusts had become

redundant. This was to be regulated by ASIC, rather than APRA and ASIC. We therefore expected and had every right to expect that ASIC had investigated and established that all was in order for this to be acceptable. So we agreed.

- Paul Gresham strongly recommended, and we had no reason to question this, that we agree with this restructuring and PST Management P/L would be retained as the Investment Manager of the Fund. He did not tell us what the ramifications of this change and the implications of splitting up the protection between ASIC and APRA would mean by having ASIC-only regulation. - i.e. that our money would not be protected by the government and that in spite of his advice, he would not be held responsible for any misfortune which might befall for our investments.

- The implications of splitting up the protection between ASIC and APRA, thereby losing APRA protection, were not explained or publicised by the government, leaving all of us investing in the Fund, unknowingly and unwittingly, very vulnerable. Had we been made aware of just what the changes to legislation would mean to my husband and me financially, we would most certainly have moved our superannuation into a much more protected investment.

- On 17 May 2007, a product disclosure Statement was issued for ARP Growth Fund by Astarra Capital Ltd, with them as the Responsible Entity and PST Management Pty Ltd as the Investment Manager.

- On 27-3-2007, the Trustee terminated PST and transferred the money to an MIS which was titled ARP Growth Fund.

- In 2002 and 2003 we took a substantial loss in our superannuation fund which was of grave concern. Peter had conversations with Paul over these losses. Paul reassured Peter that the value would improve over time – it would just be a matter of riding out the situation as we had in the past.

- The value picked up until 2008, when it dropped again. Peter queried this with Paul who gave a reassuring and feasible explanation which appeared acceptable in view of the global downturn.

- Paul was always available to speak to Peter throughout the years at any time regarding superannuation and this was very reassuring. A high level of trust existed in the relationship – Peter had instructed Paul that our funds were to be conservatively invested, with high priority to be given to security.

- When it became obvious that our superannuation was in deep trouble with Astarra Capital Limited in 2009, Paul assured Peter that only a very small proportion of our money was at risk and that the bulk of it was safe - that he had seen the assets in question. Basically, not to worry, a small loss, if at all and at the end of the "freeze" while investigations were under way, we would still have a substantial superannuation fund.

- Peter rang Paul in January 2010 to ask if he had any further news as we were going to have to sell our home if he had none. Paul countered with the fact that he also was selling his home as the situation was affecting him too!! That comment told us all we needed to know, much to our horror.

- It is morally wrong, apart from anything else, not to receive government compensation for the loss. Through no negligence on our part, we have lost our hard earned money in what has

been publicly acknowledged as the biggest fraud in Australia's superannuation history - especially, when exactly the same set of documents, which were all certified by regulators as complying, were used by the trustees of both SMSF and MSF and that MSF received 100% compensation from the government because their money was lost in fraudulent circumstances.

- SMSF members obeyed the law governing superannuation funds, but lost it all in the same fraudulent situation! What is the point of having laws and regulators, if they do not offer the protection intended to all involved. The situation becomes a case of "Rafferty's Rules" instead.

- How can some money part of a lump sum, invested in precisely the same pool, be worthy of compensation and the balance not? What makes SMSF retirees so worthless under these conditions? Why not SMF retirees too? It is a case of fraud which encompasses both funds equally.

EFFECT ON OUR LIVES.

- We moved into a beachside unit in Manly when it was an affordable place to buy in 1991. It was to be our home, we hoped, for the rest of our lives. We spent a lot of money renovating the unit over the years in order to make it as physically comfortable and as easy as possible for us to live in during our retirement. This, we hoped, would enable us to keep our independence for as long as possible.

- We started off married life almost 50 years ago with only $50.00 in the bank. We built on this to provide a good quality of life for ourselves and our two sons. We worked hard, studied and saved for our retirement years. We wanted to be totally independent and not reliant on any Government pension to live, as we planned for our old age.

- The monthly pension payment from Paul Gresham, which was our principal source of income, stopped, to our horror and dismay, in October 2009. As a result, we could no longer afford to stay in our Manly unit, as the levies and general cost of living would consume any capital we had left, leaving us struggling badly financially in our old age.

- We were left with no choice but to uproot our lives in our 70's, sell our home and find another cheaper one to provide the necessary cash on which to live. Not only did we have to sell our home, but the buyers insisted that they would only buy on the condition that we sold all our furniture to them as well!

- Selling up and the enormous mental, physical and psychological upheaval which all of that involved, was a huge stress for us, particularly as the sale was one of absolute necessity and not one of freedom of choice.

- We were leaving the security of familiar surroundings and people we knew, to go to a completely different environment to start all over again – not such an easy thing to do in one's twilight years.

- As no LPD pension payments have been made since October 2009, we now live on the invested proceeds from the sale of our unit and relatively small amounts from other investments, thereby chewing up our remaining capital. We are not eligible for a pension – yet.

- We cannot replace any of the lost money, as this has occurred at a time in our lives when we are too old to get work, and in my husband's case, too ill and requiring my care.

- We have to continue to pay audit, accountancy and tax fees, money we can ill afford, on a nil value superannuation fund "investment".

- Peter has been under the care of a neurologist for many years for ongoing issues for which there seems to be no answer. His health deteriorated even further after a severe head injury inflicted on him in Fiji in 2006, caused him to have serious and frightening seizures.

- He is now heavily medicated, has lost some of his memory, can get quite confused, at times irrational and is generally lethargic. The stress of the move, change of surroundings and environment, have all taken an additional toll on his health and sense of security – for me also.

- Because of Peter's health issues, we have not been able to visit our youngest son who lives in Perth for several years. Peter's neurologist will not allow him to fly anywhere other than by business class. This is costly and because of our financial loss, we will only be able to do this rarely. This is of considerable pain to us on top of everything else and is not helped by the fact that we have a limited number of years left in our lives in which to do so.

- The loss of our superannuation means that we no longer have the quality of life that we worked so hard to achieve. Our financial security and peace of mind have been badly compromised.

- We are not able to reap the rewards, in old age, from the many years that Peter studied, worked, and saved. We have had to return to living as we did in the early days of our marriage and adopt a frugal, penny pinching and sacrificing life style. A bitter pill to swallow after so much effort in our lives to avoid exactly this. The quality of our lives has been cruelly damaged as a result.

- In light of Peter's health, we will have to sell where we now live some time in the years ahead, to raise sufficient bond money if we need to move to a retirement village that offers high care. Should I die before Peter, who without my day to day help, will have to move as soon as possible to high care residential accommodation. This lack of finance in these circumstances is a huge worry, as well as selling up again if Peter's health fails, as it will leave me in highly straightened circumstances.

- None of this would have happened if the proper checks and research by regulatory bodies had been undertaken in the first place. There should be some iron clad controls in place to make sure that investigative checks by any regulatory body have been thoroughly undertaken and appropriate documentation issued as proof.

- When new legislation is proposed, it should be thoroughly scrutinised for any inconsistencies before being passed by Parliament. The meaning and reasons for new or changed laws for, and changes to legislation governing superannuation, should be widely publicised, so that people clearly understand what is happening and the impact it will have on their superannuation.

- Financial planners should be legally obliged to tell clients what an impact a change in law may have on their superannuation. e.g. ASIC/APRA regulation change regarding our superannuation fund.

- We have obeyed the law of the land and complied with government requirements regarding superannuation funds and yet, we have lost it all.
- Serious consideration should be given to retrospective compensation to self-managed funds affected by the collapse of Trio.

Dorothy Logan 10 August 2011

2.3 Lorna Tomkinson (with Christopher Tomkinson)

Inquiry into the Collapse of Trio Capital

I am writing this submission on behalf of my son, Christopher Michael Tomkinson, and myself, Lorna Mary Tomkinson, as the Trustees of Proword Pension Fund and Unit Holder of the ARP Growth Fund ARSN 112 315 036.

My husband and I started to save for our retirement and began our superannuation fund in 1977. The investments were in shares and my husband managed the funds. We met Paul Gresham in the mid 1980s and made the decision to hand our small superannuation fund over to his company Corporate Pension Planners, to gain the benefit of his knowledge, expertise and the advantage of joining a larger group of pooled superannuation funds.

My husband, who died in October 2003, had the contact with Paul Gresham. It was not until after his death that I started to talk to Paul and try to gain some understanding of the complexities of superannuation regulation and investment strategies. Early in 2004 my son Christopher became trustee in place of my husband.

We endeavoured to put as much into superannuation as possible during our working lives to ensure that we would be self sufficient in retirement. It was our only form of saving. When we moved from Sydney in 1999 and subsequently sold our Sydney home and business the proceeds went into the superannuation fund.

Paul Gresham's investment strategy had always appeared to be conservative and suitable for our situation and our funds grew steadily. This was what we needed for our retirement.

When Paul made the decision to join Astarra it seemed like a very sensible idea because should anything happen to Paul there would be other people who would be up to speed on our superannuation. Indeed it did appear that all was well and the monthly statements indicated such.

I was unsure about the move from APRA to ASIC in 2007. I most certainly did not understand the implications of the move but Paul assured me on several occasions that it would 'all be the same' and that all his clients in pension mode were moving over. I had no reason to distrust him so agreed to the move, to make the move easy; he had completed all the paperwork, all I had to do was sign and return in the envelope provided.

He took some time to explain that there would be 10 fund managers and they only would be paid on performance. Paul never indicated that he was one of the fund managers. My understanding of his role was that he was my investment advisor and handled the administration of our super fund. Paul said that if the fund managers did not perform they would not get paid. I was naïve, gullible and uninformed on superannuation and placed trust in someone who had earned that trust over a 20 year period.

I became concerned when the MARQ property trust was revalued down, twice. Each time I spoke with Paul and he gave me confidence that it was little more than a hiccup in the big scheme of things.

When ASIC froze all Trio Capital Ltd investments in October 2009, preventing investors in the Astarra Strategic Fund from withdrawing funds, Paul assured me that the ARP Growth Fund only had 2 percent exposure to ASF and that, it was all a "storm in a tea cup about some wording on an old PDS". He assured me that everything would be fine and the pension would come through before 9 November. When that date passed, he then assured me that it would be through by 23 November.

My brother in law Barry Tomkinson went to see Paul in December 2009 after which he wrote a letter asking for information. After receiving Paul's written response in January 2010, I became very concerned. Paul said he had been advised not to talk to us again unless it was through a lawyer.

I realised then that it was quite likely that all of my superannuation was gone – our total life savings. I found it quite hard to comprehend that Paul, who had been so good in looking after our superannuation for so long, could have allowed this to happen. It just did not seem possible.

I became very fearful for my future; it seemed that I had lost everything that we had put into over superannuation over a 33 year period.

I tried to find a part time job but was told that I was too old or overqualified. I went to see Centrelink to see if they would assist me, they could only help me if I looked for full time work. This did not want to do as I was hoping to keep the small farm that my husband and I purchased and I needed a few days a week to work the farm. The small farm was a dream that we had and I wanted to hold onto that dream.

Eventually in March 2010 I secured part time work.

I feel cheated by the regulators who are supposed to be experts in their field. Part of their job is to ensure that those in responsible positions of managing millions of dollars of self-funded retiree's superannuation are responsible, ethical and honest. The regulators did not do that. It was our intention to never be a burden on society and to care for ourselves in our later years. It is my belief that the regulators and gatekeepers fell down on their duty of care. Yet there is no penalty for them only total devastation for those members of ARP Growth Fund.

I would like to see ASIC properly investigate and prosecute where necessary, all those involved in allowing this 'biggest fraud in Australian superannuation history' to occur. I would like some safeguard, similar to part 23 of the SIS, to be put in place for trustees of SMSF, where the trustees are relying on others to make investment decisions. And finally I would like all members of ARP Growth Fund to receive compensation similar to others under the Trio umbrella. Everyone relied on the same PDS information, approved by the regulators, for their investment decisions, it is incomprehensible that some get compensation and others do not.

Lorna Tomkinson

2.4 ARP Growth Fund Member Survey

The Association has conducted a survey of all member unit holders as to how the collapse of the ARP Growth Fund has impacted them. There are a number of significant points revealed.

- 91% of Members are aged over 60 years.
- 68% of Members are aged over 65 years.
- The majority of Members are unable to re-enter the workforce and replace their Superannuation losses.
- Members are married in the main but 13% are widowed.
- 79% of Members contributed to the ARP Growth Fund or its predecessors from 15 years to more than 20 years.
- 17% have sold their homes and 40% have sold other assets, because of the loss of their Superannuation investment.
- 42% have no other investments.
- Nearly 1/3 of the Members have had to seek Centrelink benefits.
- 2/3 of Members' health has been affected since the collapse of the Fund.

Appendix 3

Submission to the Future of Financial Advice Options Paper. 21 February 2011.

Association of ARP Growth Fund Unitholders Inc
Ron Thornton
President
27 Paul Court
Baulkham Hills NSW 2153.
21 February 2011

Future of Financial Advice
Department of Treasury
Langton Crescent
Canberra ACT 2600.

Submission to the Future of Financial Advice Options Paper

This submission is made by the Association of ARP Growth Fund Unitholders Inc (the Association).

The objectives of the Association are:
" To represent and promote the interests of investors in entities managed by or otherwise associated with (or formerly managed by or associated with) Trio Capital Limited (including the ARP Growth Fund), to lobby relevant authorities in respect thereto, to seek compensation for members in respect thereto, to provide information to members in respect thereto and to undertake activities incidental thereto. "

1. **Self Managed Superannuation Funds (SMSF's) need improved levels of regulatory protection.**

   a. The Association wishes to make a specific point in relation to the discussion on the distinction between retail and wholesale clients in regard to those clients considered to be in need of regulatory protection.

   b. Following the *Wallis Inquiry* in 1997, the *Corporations Act* was amended by the *Financial Services Reform Act 2001* to establish a difference between the levels of consumer regulatory protection offered to retail and wholesale clients.

   c. Generally retail clients enjoy a higher level of consumer protection as they are deemed to be less well informed and therefore less well able to assess the risks involved in financial transactions.

   d. The one notable retail exception to this general principle appears to lie in the field of Self Managed Superannuation Funds (SMSF's), in particular in regard to the total exclusion of SMSF's from the consumer protection offered to the members of other regulated superannuation funds under part 23 of the *Superannuation Industry (Supervision) Act (SIS).*

   e. The Association questions the appropriateness of this broad exclusion and in particular the apparent total extent of its applicability. The Association believes it should be modified to better cater for situations in which SMSF retail members are clearly disadvantaged under circumstances in which *regulated* retail (and wholesale) superannuation funds may qualify for consumer protection under part 23 of *SIS,* yet SMSF retail clients in a precisely similar position are excluded from this protection.

   f. This is, in the view of the Association, an unintended anomaly which should be addressed as one of the outcomes of the Future of Financial Advice review process. By so doing, the Association believes that the Federal Government will be able to better provide regulatory protection to this significant and growing group of retail SMSF investors, in those specific circumstances where such additional protection is clearly warranted.

g. The absence of such protection appears not only to be confusing to such clients, but also to many providers of financial advice upon whose advice these clients initially base their superannuation decisions. The trustees of SMSF's are currently treated more like "professional investors", akin to the mostly professional trustees of large regulated superannuation funds, whereas they should in fact generally be regarded as less sophisticated retail clients. Indeed, many of them are retail small business owners.

h. The Federal Government is seeking to draw a line as to which investors need improved protection. The Association believes that the great majority of SMSF's clearly fall into the retail category and should be entitled to the greater levels of regulatory protection enjoyed by such clients, in specified situations of fraudulent conduct or theft.

2. What needs to be altered to improve levels of regulatory protection for SMSF's?

a. Currently only the trustee of an APRA regulated superannuation fund can apply to the Minister for a grant of financial assistance, if the fund suffers an "eligible loss" as the result of fraudulent conduct or theft. The same legislation specifically excludes the trustees of SMSF's, regulated by the Australian Tax Office, from applying for similar assistance, even under circumstances which are identical.

b. The Association believes that this outcome was never the intended outcome of the *2003 Review into Part 23 of the SIS Act (1993)*. The general philosophy underpinning the prudential regulation of superannuation is that the trustee of a superannuation fund bears primary responsibility for the fund's prudent operation. Nevertheless, recognising the importance of financial stability, the Government also applies an additional layer of prudential regulation to promote sound risk management. Furthermore, it is recognised in the *SIS Act* that in the case of fraud or theft that there is a case for Government intervention to provide compensation, in particular under part 23.

c. The exclusion of SMSF's from the part 23 protection was originally justified on the grounds that the SMSF trustees are also fund members. It was therefore assumed that the trustee(s) will act in their own best interest and that as a result "members do not need the full range of statutory measures to protect them in relation to the conduct of the trustee" (*Review page 4*).

d. While there may be some logic to this approach, it also carries clear limitations. The Association is of the view that this exclusion operates unduly harshly against the members of SMSF's under certain circumstances and needs to be amended to provide them with greater regulatory protection.

e. The circumstances in which improved protection is required are those in which SMSF trustees act in good faith and to the same standards as those trustees of regulated superannuation funds, and yet their members are grossly disadvantaged in cases of fraudulent behaviour and/or theft. The fact that, under the same set of circumstances, the members of the regulated funds are eligible to apply for compensation, whereas the members of a SMSF are not, is clearly one capable of causing gross inequity.

f. The anomalous treatment of SMSF's is well illustrated in the current case of the liquidation of the superannuation funds managed by *Trio Capital*, including the *ARP Growth Fund*. These Funds were wound up in the Courts in 2010, Justice Palmer being moved to remark that the events which led to this liquidation amounted to a "scandalous fraud". The Trio Capital funds included both regulated superannuation funds and SMSF's.

g. The trustees of both types of funds made their investment decisions based upon information provided from the same documentation, using identical product disclosure statements issued under the guidelines of, and with the approval of, the appropriate Australian Government Regulator. (It has indeed even been suggested in the media that the product disclosure statements themselves were deficient in terms of the use to which investor money was to be put.)

h. Both sets of trustees clearly formed the view that, based upon the information provided in those Regulator approved documents, it was in their members' interest to invest in the Trio Capital managed products. Yet when it turned out that they had all been subject to the same complicated deception and fraud, only the members of one group had an avenue of appeal open to them under part 23, namely those under regulated funds.

i. In a post GFC environment in which improved investor protection is a stated Government priority, it is no longer possible to justify the discriminatory treatment suffered by members of SMSF's such as outlined in the case above. The Minister for Financial Services and Superannuation, in his response to the Cooper Review, has promised to provide superannuation members with improved levels of protection and this is clearly a case where such improved protection is required.

3. Recommendation

The Association believes that public policy dictates that an improved level of protection for SMSF members is warranted under the extreme conditions outlined above. The Association therefore recommends that the Federal Government move to include the ability for SMSF members, who act in good faith and who are nevertheless the innocent victims of fraudulent behaviour or theft by external third parties, to be able to apply to access the provisions of part 23 of the *SIS Act.*

Please do not hesitate to contact the undersigned should you require any further information.

Yours sincerely,

Ron Thornton
President
Association of ARP Unitholders Incorporated

Appendix 4

Submission to the Statutory Compensation Review (Future of Financial Advice).
22 May 2011. (In response to the Consultation Paper prepared by Richard St. John).

Association of ARP Unitholders Inc
Ron Thornton,
President
27 Paul Court
Baulkham Hills NSW 2153.
22 May 2011

Statutory Compensation Review
Future of Financial Advice
PO Box 6295
Kingston ACT 2604.

Submission to the Statutory Compensation Review (Future of Financial Advice)

This submission is made by the Association of ARP Unitholders Inc (the Association) in response to the Consultation Paper prepared by Richard St. John, April 2011.

The objectives of the Association are:
" To represent and promote the interests of investors in entities managed by or otherwise associated with (or formerly managed by or associated with) Trio Capital Limited (including the ARP Growth Fund), to lobby relevant authorities in respect thereto, to seek compensation for members in respect thereto, to provide information to members in respect thereto and to undertake activities incidental thereto. "

The Association has previously responded to the Future of Financial Advice Options paper with a submission dated 21 February 2011, urging improved levels of regulatory protection for Self Managed Superannuation Funds (SMSF's).

That submission, a copy of which forms an appendix to this document, is complementary to it and should be read in conjunction with it.

A. Brief Recent History of ARP Growth Fund

The comments made in this submission with regard to the compensation arrangements for consumers of financial services are particularly framed in response to the experience of the 74 unit holders of the ARP Growth Fund. This Fund holds superannuation assets that in August 2009 were reported to amount to approximately $54 million.

The collapse of Trio Capital Limited in late 2009 led to the ARP Growth Fund being one of five Trio Capital Funds wound up by Court order issued by Justice Palmer in April 2010, the result of what he described as a "scandalous fraud". In May 2010 the liquidators, PPB, issued a report into ARP Growth Fund in which they ascribed a nil current value to the assets in the fund.

Bill Shorten, the Assistant Treasurer and Minister for Financial Services and Superannuation, recently announced that all APRA regulated superannuation funds associated with Trio Capital would have 100% of their lost assets reimbursed under the provisions of Part 23 of the *Superannuation Industry (Supervision) Act (SIS).* . However, all SMSF's associated with Trio Capital (under ATO regulation) would receive no reimbursement.

The majority of ARP Growth Fund unit holders are either elderly pensioners, or baby boomers approaching retirement. Most had been clients of the same superannuation/financial adviser for the previous two decades. Many had all, or nearly all, of their investments in the ARP Growth Fund.

As a result of the Fund being wound up with assets of no current value, all unit holders have had their asset base significantly reduced. Many are now effectively destitute, with their life time superannuation investments wiped out at a point at which they have little hope of replacing them via re-entry to the work force. For this group in particular, the failure associated with the Trio Capital has truly been catastrophic in its impact on many of their lives.

Investigations into the affairs of ARP Growth Fund by ASIC and PPB has been protracted and remains on-going. Over twelve months has passed since PPB placed a nil valuation on the ARP Fund. Evidence of the underlying assets and their value is still not available to Unitholders, nor has any person or persons being charged with possible offences as detailed in the PPB report to unit holders on 18 May 2010.

B. Compensation arrangements for financial services consumers

The Association has closely studied the Richard St. John Consultation paper and would like to comment as follows:

1. *Insurance as a means of compensation is deficient, particularly under catastrophic situations*

   Professional indemnity insurance as a means to compensate complainants has failed in the case of ARP Growth Fund members. The insurance cover and arrangements in place for Trio Capital have been inadequate to even begin to satisfy the number of claimants and the quantum of funds lost. This fact is also true of PI cover in place in the supply chain leading to Trio Capital. Namely, at the Dealer Group level (Wright Global Pty Ltd in liquidation) and at the adviser/investment manager level (PST Management Pty Ltd in liquidation).

   For example, PST Management Pty Ltd hold PI cover of $5 million, which is less than 10% of the assets "lost". Wright Global Investments Pty Ltd holds a similar amount of PI cover. Putting aside the difficulty and legal expense of recovering under such a policy, the quantum available means that no substantive level of compensation for loss is possible, even if a legal action is successful.

   This situation is made more difficult by the tendency of groups caught up in these situations to go into liquidation, as has now happened not only with Trio Capital but also PST Management and Wright Global. This means that any monetary compensation has to be directed towards the PI insurer only, as the licensee is no longer in a position to meet the liability.

   In the case of the unit holders of ARP Growth Fund, where the average client assets under management (AUM) was in excess of $750,000, the lack of compensation is compounded by the fact that for many this amounts to a financial wipe out of their entire superannuation fund. As many are pensioners of advanced age, this means that many have been reduced to levels of near poverty at a time when their capacity to return to the workforce is well nigh non existent.

2. *Run-off cover is essential*

   In the case of ARP Growth Fund unit holders, great uncertainty as to what exactly was happening with unit holder funds existed for many months and was not clarified until well after the PI cover was no longer in place. There was no opportunity to even lodge claims at this point, should a unit holder have wished to do so.

3. *Insurance caps need to be realistic if it is to deal with a catastrophic occurrence*

   PI insurance needs to be able to deal with situations such as ARP Growth Fund, but is currently not well set up to do so. PI cover is unsuited to respond to situations where multiple large claims arise, which means that the aggregate quantum exceeds even large cap amounts. This situation is made worse when the licensees are unable to meet the excess from their own financial resources.

4. *Liquidators are reluctant to pursue insurance claims in catastrophe situations*

Liquidators have the right to pursue claims on behalf of claimants in cases where the licensee becomes insolvent, but in the case of ARP Growth Fund this has been found to be largely academic as the liquidator faces a real life situation where not only do the amounts claimed overwhelm the PI cover, but their own fees are no longer guaranteed due to the fact that the Fund has no value. They are therefore reluctant to act, as this will incur additional expenses for them which are unlikely to be recovered.

5. *Policy conditions and exclusions need to be publically available*

Claimants and potential claimants in catastrophic situations often find themselves in desperate situations. In the case of ARP Growth Fund members, all principle parties who carry PI cover are in liquidation, the liquidators have no or limited funding to act on the behalf of claimants, and the potential claimants themselves have much reduced financial circumstances.

Engaging expensive legal advice under these circumstances is an uncertain and limited option. The uncertainty is however much worsened by the refusal of PI insurers to make available to claimants the policy conditions governing the specific PI policy, so that they have no way of knowing what their right may be unless they launch expensive legal action.

Pursuing PI compensation under such circumstances becomes well nigh impossible and direct action by ASIC on behalf of those affected becomes the only viable option (as in the case of Westpoint).

6. *Summary views of ARP Growth Fund Association*

ARP Growth Fund investors trapped in the above web of difficulty report feeling that they are powerless to react effectively and that they have been caught up in a "perfect storm" Recent market research conducted on behalf of ASIC supports this view and suggests that it is wide spread amongst those who have suffered financial loss as a result of misconduct. The research, conducted by Susan Bell Research, found that the social impact of major financial loss could be "catastrophic".

Many investors felt that their loss was "so significant that their lives would never again be the same" and felt prolonged anger, uncertainty, worry and depression. They also felt a lack of confidence in the Australian financial system, including the Federal Government and ASIC.

a. The Association believes that the current compensation arrangements for SMSF's require revision to better cater for catastrophic situations, as has occurred in the case of ARP Growth Fund Unitholders. Clearly the retail SMSF protection safeguards currently in place are woefully inadequate, or in this case, are simply unworkable, as outlined above.
b. The difference in compensation approaches between regulated funds and SMSF's under Part 23 of SIS clearly has given rise to an inequitable two tier system of retail investor protection that cannot be justified under these circumstances.

A better solution needs to found for circumstances where both regulated funds and SMSF trustees have been the victims of the same external third party fraudulent misconduct or theft.

c. The Association is not suggesting that compensation be always guaranteed, but that where it is given, that it should not be done in an arbitrary manner that benefits only a selected group of retail investors (regulated funds) over another group of retail investors (SMSF's).
d. Grants of financial assistance by the Federal Government under Part 23 of SIS to only one of the two groups has no logical or moral basis and amounts to poor public policy. It is unsustainable and clearly will need to be remedied at some point. The Association believes that the current review is the appropriate time to do so.

C. Points needing clarification

1. The review is solely concerned with the financial security of retail clients. There seems to be some confusion as to when and even whether SMSF's are included under the retail classification.

D. Recommendations

1. ***The Association recommends that the Federal Government investigate the establishment of a statutory compensation scheme, the design of which will need to adequately protect consumers caught up in extreme situations outside of their control. Such a scheme should extend to SMSF's***

   Explanatory note: The Association believes that relying on professional indemnity insurance compensation to cover all possible financial service licensee wrong doing does not work. It has too many limitations, especially as a last resort statutory compensation scheme and in cases of catastrophic loss, as per ARP Growth Fund unitholders. There needs to be a financial services provider equivalent of the National Guarantee Fund (NGF) which has been operating for clients of the ASX since 1987. The NGF has many investor protection features which would make it an excellent model. The Financial Services Compensation Scheme (FSCS) run in the United Kingdom provides an external model which also has much to recommend it.

2. ***The Association recommends that SMSF's with assets under $10 million, who are explicitly recognised as enjoying full retail fund protection in terms of the Corporations Act, also enjoy similar retail protection as afforded to APRA regulated retail funds, under Part 23 of SIS.***

   Explanatory note: Refer the summary notes under section B.6 above. This may require the creation of a suitable levy system (or similar) to fund the operation of the scheme.

3. ***The Association recommends that PI insurance cover have legislated higher minima so that at least 25% of the funds at risk are covered, subject to agreed maxima and minima.***

   Explanatory notes: There is clearly an ongoing role for PI insurance in a wide range of situations, excepting perhaps the proposed "last resort" coverage. This PI cover needs to be adequate to meet the reasonable expectations of claims that might be made in the normal course of events. In the case of ARP Growth Fund, the minimum PI insurance should therefore have been $13.75 million, not the actual $5 million (25% of $54 million). Such an approach would also need to include a minimum amount of PI cover (suggest $10 million) and would need to phase out at an agreed maximum (suggest $100 million).

4. **The Association recommends that the policy conditions providing such PI cover for each licensee should be made publically available at all times to investors in the funds.**

   Explanatory note: Refer B.5 above. Any policy exclusions should be highlighted prior to the investor making an investment decision and should be subject to the approval of ASIC. Key "standard cover" inclusions should be made mandatory to provide comprehensive cover to investors and ASIC should sight on an annual basis a current certificate of currency.

5. **The Association recommends that PI policies should all carry legislated run off cover for a minimum of 18 months.**

   Explanatory note. Refer B.2 above

Please do not hesitate to contact the undersigned should you require any further information.

Yours sincerely,

Ron Thornton

President
Association of ARP Unitholders Incorporated

Appendix 5.

Chronology. Chronology of the key events leading up to the winding up the ARP Growth Fund in March 2010

ARP GROWTH FUND CHRONOLOGY

1. Professional Pensions PST (constituted on 15 October 1984 as the CPP Superannuation Pool).

2. Contributions were made by the employer and by salary sacrifice.

3. Investments made in the Professional Pensions PST (Balanced Growth (Maple Brown Abbott) Division (note that this may not be the same for all people).

4. Sometime before 2004, PST Management Pty Limited became the Investment Manager of Professional Pensions PST.

5. From February 2004 onwards, Paul Gresham was the sole director and the company secretary of PST Management Pty Limited, Susanne Dohring resigning as a Director in January 2004.

6. On 24 February 2004, PST Management Pty Limited became an authorized representative (rep no 26421) of Wright Global Investments Pty Limited (AFSL 225058). PST Management Pty Limited continued to operate as an authorized representative of Wright Global Investments until 31 December 2008.

7. In April 2004, Paul Gresham / PST Management Pty Limited wrote to investors saying that it had been decided to replace Maple Brown Abbott as the manager of the balanced growth division and to replace them with at least 10 new fund managers appointed to manage Absolute Return Portfolio.

8. On 11 June 2004:-

   - The Trust Company Superannuation Services Limited retired as the Trustee of Professional Penions PST.
   - Astarra Capital Limited was appointed as the Trustee of Professional Pensions PST.
   - Permanent Trustee Company Limited was appointed as the Custodian.
   - Wright Global Investments Pty Limited replaced PST Management Pty Limited as Investment Manager of Professional Pensions PST (instructing the Trustee on the advice of its authorized representative Paul Gresham).

9. Around November 2004, all units in the Maple Brown Abbott Trusts were redeemed and reinvested in the Absolute Return Portfolio Divisions (principally in the shares of Professional Pensions ARP Limited, a British Virgin Islands Segregated Portfolio Mutual Fund Company).

10. On 28 February 2005, ANZ Nominees Limited replaced Permanent Trustee Company as Custodian.

11. On 27 March 2007, Paul Gresham wrote to the investors in Professional Pensions PST, stating that:-

- That following a review by APRA in December 2006 it had been decided the Trustee (Astarra Capital Limited) should take over more of the "day to day" administration and that the Fund should be restructured as an MIS to be regulated by ASIC rather than APRA and ASIC.
- That this was a course of action strongly recommended by Paul Gresham; and
- That PST Management Pty Limited will be retained as the Investment Manager of the Fund.

12. On 17 May 2007, a product disclosure Statement was issued for the ARP Growth Fund by Astarra Capital Limited, with:-

- Astarra Capital Limited as the Responsible Entity; and
- PST Management Pty Limited as the (Investment Manager).

13. In May or June 2007, investors in Professional Pensions PST were sent copies of the PDS for ARP Growth Fund with their details already filled in the application form for them to sign and return to Astarra Capital Limited.

14. On 29 June 2007, the Trustee (Astarra Capital Limited) terminated Professional Pensions PST and former investors in Professional Pensions became unit holders in ARP Growth.

15. On 9 May 2008, investors received from Paul Gresham a structure diagram showing the investment structure of the ARP Growth Fund.

16. On or about July 2008, investors received the June 2008 Quarterly Report from PST Management Pty Limited.

17. On 28 August 2008, Paul Gresham wrote to inform the unit holders that the ARP Growth Fund Constitution and PDS would be altered to increase the maximum period for redemptions

to be paid from 60 days to a sliding scale where, in order to redeem more than 50%, the time would be 270 days of the date of notice. This was ultimately passed by the unit holders on 3 October 2008.

18. On or about October 2008, investors received the September 2008 Quarterly Report from PST Management Pty Limited.

19. On 31 December 2008, PST Management Pty Limited ceased to be the authorized representative of Wright Global Investments Pty Limited.

20. On 12 January 2009, PST Management Pty Limited became the authorized representative (Rep No 264261) of Gerling & Company Pty Limited (AFSL 218770).

21. On or about January 2009, investors received the December 2008 Quarterly Report from PST Management Pty Limited.

22. On or about April 2009, investors received the March 2009 Quarterly Report from PST Management Pty Limited. In this report, there is a reference to "MARQ Property Trust Unit" being unchanged since October 2008 due to a protracted process of replacing the trustee and manager, but that an updated valuation was expected within 2 weeks of the report.

23. On or about 17 June 2009, investors received a letter from Paul Gresham relating to the MARQ Property Trust, explaining that:-

- There had been a 51.5% reduction in the valuation; and
- That MPT represented 9% of the investments of ARP Growth Fund.

24. On or about 17 June 2009, investors also received the June 2009 Quarterly Report from PST Management Pty Limited, which:-

- Explained the quarterly performance of the fund of -6.1% as being entirely attributable to the write down in MARQ Property Trust ...."; but states: "however, the fund as a whole has stood up more than favourably with many managed funds, as evidenced in the attached list extracted from the Financial Review".

25. Astarra continued to send unit holders monthly statements regarding the value of their units up until August 2009.

26. Unit holders in Pension mode received their last Pension remittance for September 2009 in October 2009 (14 Months ago). Unit holders in accumulation mode have not been able to convert to Pension mode regardless of their financial or health circumstances.

27. On 19 March 2010, ARP Growth Fund is wound up by the Order of the Court.
