COMMONWEALTH OF AUSTRALIA

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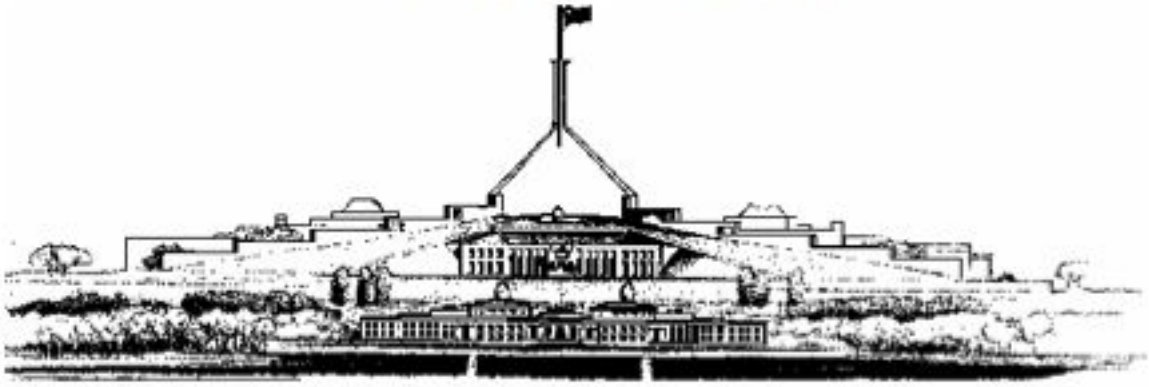

HOUSE OF REPRESENTATIVES

COMMITTEES

Corporations and Financial Services Committee

Report

SPEECH

Wednesday, 31 October 2012

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date	Wednesday, 31 October 2012	**Source**	House
Page	12769	**Proof**	No
Questioner		**Responder**	
Speaker	Fletcher, Paul, MP	**Question No.**	

Mr FLETCHER (Bradfield) (12:01): by leave—I am pleased to rise to comment on the most recent report of the Parliamentary Joint Committee on Corporations and Financial Services in the discharge of its statutory oversight of the Australian Securities and Investments Commission. I want to highlight two aspects of the matters that were discussed by the committee with ASIC at the most recent hearing. Once concerns the collapse of Trio and the other concerns the implementation of the so-called FoFA, Future of Financial Advice, reforms.

Let me speak firstly in relation to Trio. At the hearing, ASIC reiterated its view that the loss suffered by investors in ARP Growth Fund ultimately resulted from investment decisions rather than fraud. In response to a question from me, where I asked, 'So it is your view that it was a genuine, albeit risky, investment rather than a vehicle promoted by fraudsters?' Mr Price, of ASIC, responded, 'We have seen some of the agreements relating to the collateralised leveraged credit default swaps and we consider them to be genuine,' and Mr Medcraft responded, 'We have looked at some of the reference entities on the swap as well, and they were genuine.' Let me repeat my view that this is a convenient conclusion for a regulator to reach, but it appears to me to be a conclusion which the facts do not presently allow to be reached. I do not say it could never be reached in the future but, based upon what is known right now, I am unpersuaded by ASIC's view—and I will indicate some reasons for that.

Firstly, it is clear that a number of dubious individuals are heavily involved in the overall factual matrix concerning Trio. Secondly, Mr Paul Gresham, later known as Mr Tony Maher, was involved in the management of the ARP Growth Fund—indeed, he was the key figure. This is a man from whom ASIC have now obtained an enforceable undertaking. So, on the one hand, ASIC think there is something dubious about his conduct, yet on the other hand they appear to be satisfied that there was no fraud in the way the money was invested. Another factor is information that I am aware of, which I know ASIC is also aware of, about the path traced by the funds invested by the ARP Growth Fund. I will not say or disclose more about that as I do not want to prejudice potential further investigations.

ASIC also informed the committee that it does not think there is a sufficient basis to charge the man who is widely thought to be the mastermind of the Trio fraud, Jack Flader—although ASIC conceded that it had not discussed the matter with the Director of Public Prosecutions before reaching this view. ASIC also told the committee that it does not intend to take any civil action against the auditors of the Trio fund, nor against any other parties. It made this statement in answering a question that I had put on notice. It had this to say:

ASIC does not propose at this stage to pursue civil action against the Trio auditor.

In respect of possible recoveries from other parties, ASIC has looked at a range of persons and entities. Of these persons and entities considered we have not identified any significant funds, assets or insurance that would satisfy a judgement debt even if ASIC identified and successfully pursued a claim against these persons.

We are aware that a claim bought in the Supreme Court of New South Wales by an investor in the Astarra Strategic Fund has been settled in favour of the investor. Notwithstanding this successful proceeding we are of the view that the funds/assets available are not sufficient to adequately compensate all the affected investors in the Astarra Strategic Fund given the size of the total losses.

This is, again, a disappointing answer. In particular it is hard to reconcile this answer with the fact that, although there is now a limitation on auditors' liability of 10 times their professional fees, that limitation has only been in place since 2008, whereas the Trio fraud goes back several years earlier. I repeat my view that I am underwhelmed by the vigour with which ASIC and other regulators are pursuing this fraud.

Indeed, I am surprised at the leisurely approach which is being taken, when $176 million has been defrauded from Australian superannuation investors.

In particular, I do not understand why, in the case of other major instances of Australian investors losing millions of dollars, such as Westpoint and Storm, ASIC has, quite correctly, had a clear focus on seeking to recover moneys lost by investors, but that does not appear to be a priority for ASIC in the case of Trio. I refer to the answer to the question on notice that I have just cited.

Once again, I call on the Minister for Financial Services and Superannuation to show some urgency on this issue. Remember that this is the minister who earlier accused the self-managed superannuation fund investors involved in Trio of 'swimming outside the flags'. For example, I wonder why the minister has not directed ASIC to form, jointly with other regulators, a task force of officials directed towards aggressively litigating against any party involved with a view to recovering any moneys which may be involved for recovery.

Let me turn to another matter I want to briefly speak about, which is the implementation of the Future of Financial Advice reforms, the FoFA reforms. The committee's report refers to the assurances of ASIC officials that ASIC is adopting a 'facilitative approach' to the implementation of the FoFA reforms. I am receiving very strong expressions of concern from industry in at least one specific area which is not consistent with those soothing words. I refer to the ASIC's consultation paper 189 entitled 'FOFA: Conflicted Remuneration'. I quote from one letter I have recently received:

We are concerned that we will be dragged into a very rigid remuneration structure that is unworkable for a boutique investment management firm which traditionally operates on a performance based approach (in the way of most professional service firms).

[Our firm] manages investment portfolios for non-retail clients on a discretionary basis. We charge an asset based fee for management.

I have attached the pages of Paper 189 that worry us. Despite the reference to retail clients we understand that where conflict of interest is concerned ASIC will make no distinction between wholesale and retail. Effectively where one of the KPIs—

that is, key performance indicators—

for portfolio managers is raising of new money we will be caught in the net and the bonus structure will be limited to 5-7% of base salary and that bonus will be widely defined as in para 68. This is a totally unworkable business model.

That letter highlights one of the problems we are seeing, which is that the approach to the implementation of FoFA is going to catch businesses and organisations which operate well beyond the set of factual circumstances which originally led to the Ripoll inquiry, namely, the investments failures of ventures like Storm and Westpoint, which of course were targeted at unsophisticated retail investors.

By contrast, the firm referred to in the letter that I have quoted from is a boutique investment adviser serving sophisticated non-retail clients. I would urge ASIC to give careful consideration to the way it has drafted consultation paper 189 and to take account of these concerns.