



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 5, 100 Market Street,
Sydney NSW 2000

Mail address for Sydney office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075
Fax: +61 1300 729 000

www.asic.gov.au

Discretionary Payment Team
Risk & Claims Branch
Department of Finance

13 July 2021

Dear Sir / Madam,

**ACT OF GRACE PAYMENT APPLICATIONS SUBMITTED BY s22(1)(a)(ii) ON BEHALF
OF INVESTORS IN TRIO CAPITAL LIMITED**

1. ASIC refers to the applications submitted by the s22(1)(a)(ii) to the Department of Finance (**Finance**) on behalf of investors (**Applicants**) in Trio Capital Limited (**Trio Capital**) (**Applications**).
2. The Applications are made under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) and seek act of grace payments in respect of losses incurred by the Applicants, as a result of alleged 'defective administration and conduct' by the Australian Prudential Regulation Authority (**APRA**).
3. The Applications are accompanied by forms signed by the Applicants authorising s22(1)(a)(ii) of s22(1)(a)(ii) to act on behalf of each Applicant as their representative. The Applications are supported by a report prepared by s22(1)(a)(ii) on behalf of each of the Applicants titled 'Application for an Act of Grace Payment' (s22(1)(a)(ii) **Submission**).
4. ASIC has reviewed APRA's responses to the Applications dated 30 July 2020 (**APRA Submission**) and 12 January 2021 (**APRA Further Submission**).
5. The APRA Submission provides at paragraphs 5 to 6 a summary of the legal basis for act of grace payments. ASIC considers that this is an accurate summary of the statutory framework.
6. The purpose of this submission is to respond to Finance's request for a response from ASIC to any concerns or matters raised by s22(1)(a)(ii) in the Applications that ASIC considers it is appropriate for it to address.

ASIC RESPONSE

7. There are only limited references to ASIC in the s22(1)(a)(ii) Submission, and no specific contentions of defective administration. The primary purpose

of this submission is therefore to assist Finance by providing contextual information that ASIC considers is relevant to assessing the Applications.

s37(2)(b), s47C, s47E(d)

9. For the reasons set out in this submission, ASIC considers its actions in relation to Trio Capital were appropriate.

Role of ASIC and its regulatory objectives

10. ASIC regulates corporations, managed investment schemes, participants in the financial services industry and people who engage in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**).
11. ASIC was established by section 7 of the *Australian Securities and Investments Commission Act 1989* (Cth). The objectives of ASIC, as set out in subsection 1(2) of the ASIC Act, relevantly include that ASIC 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it': see subsection 1(2)(g).
12. It is clear from the terms of subsection 1(2) of the ASIC Act that it does not impose a legal duty, obligation or requirement on ASIC to take any particular action on any given set of facts. ASIC must strive to achieve its objectives but is not under an obligation to anybody to take any particular action.¹
13. ASIC's *Information Sheet 151: ASIC's approach to enforcement* ([INFO Sheet 151](#)) sets out how ASIC selects matters for formal investigation. INFO Sheet 151 states that ASIC considers the following issues when deciding whether to take enforcement action:
 - a. ASIC's strategic priorities, taking into account matters such as the seriousness of the alleged misconduct;

¹ *Bhagat v Global Custodians Ltd* [2000] NSWSC 321 at [8] and [12].

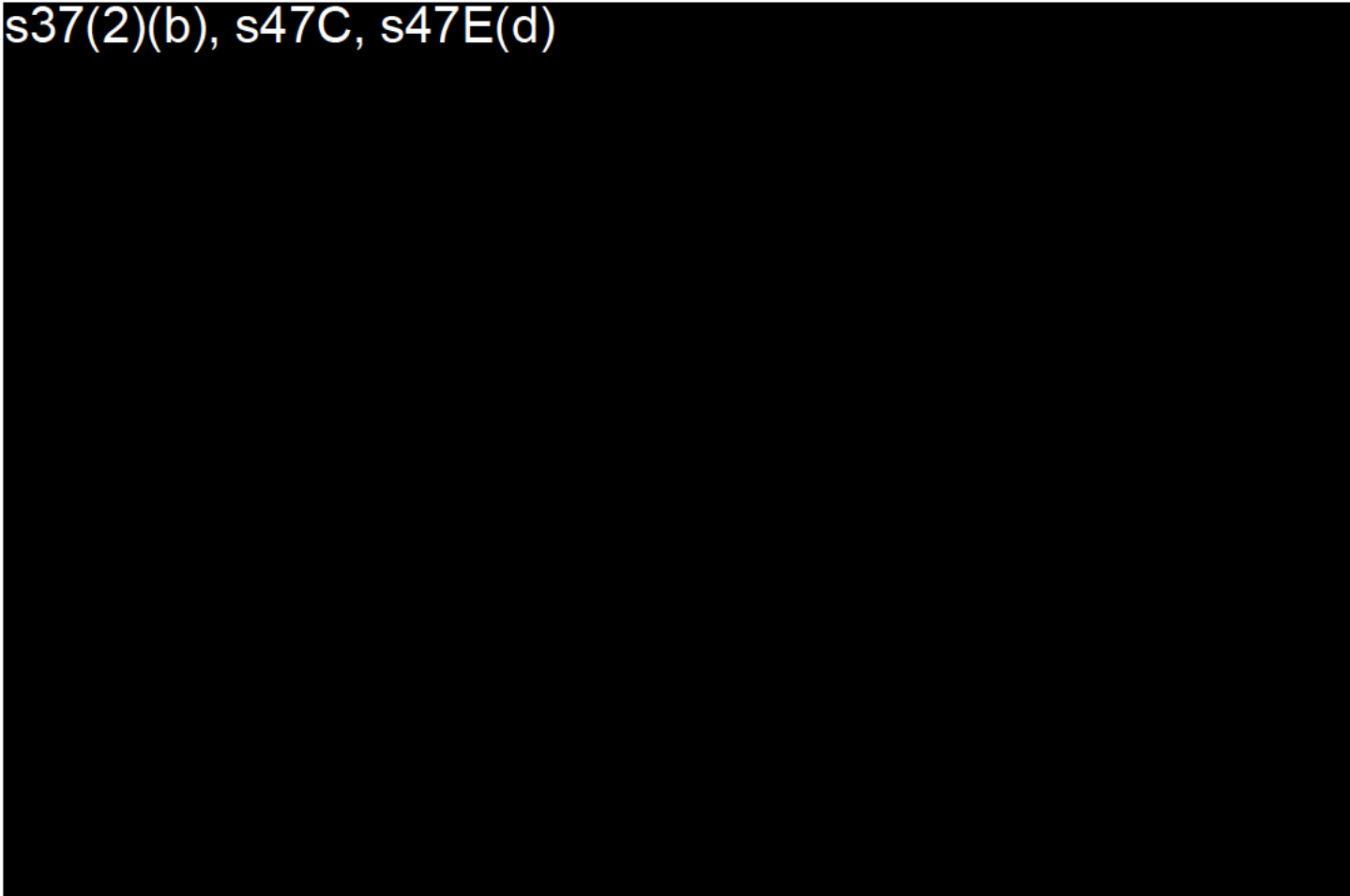
- b. the regulatory benefits of pursuing the alleged misconduct;
- c. the issues specific to a case, such as the availability of evidence admissible in court and whether the alleged conduct is continuing; and
- d. alternatives to a formal investigation which might address ASIC's concerns more effectively, such as engagement with stakeholders and surveillance.

14. ASIC's statutory obligations mean that ASIC is obliged to take such enforcement action as it decides is best suited to the evidence available to it at the relevant times. As stated in INFO Sheet 151, ASIC:

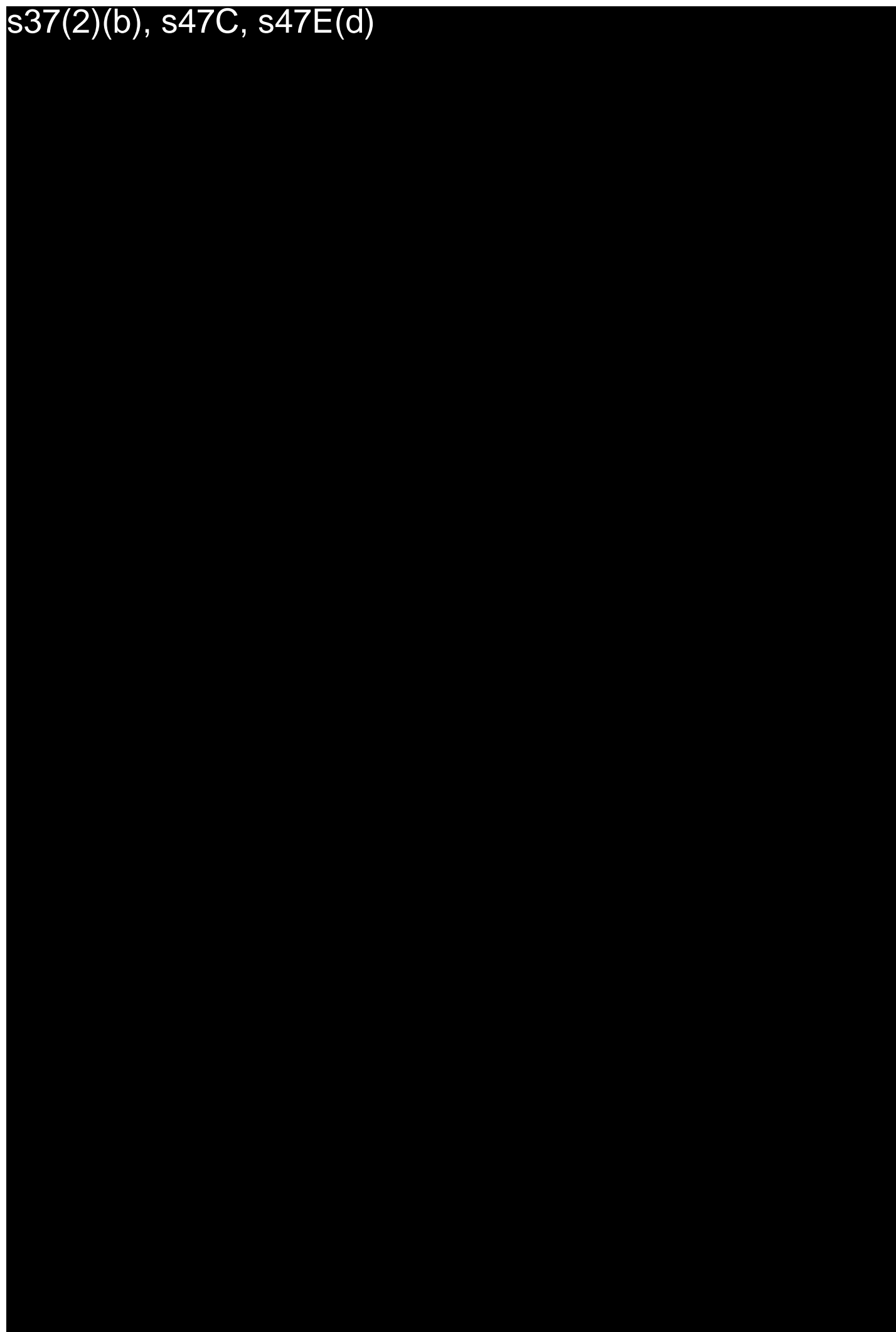
' ... can pursue a variety of enforcement remedies, dependent on the seriousness and consequences of the misconduct. Some remedies involve relatively minor consequences while others will be serious, such as imprisonment and high monetary penalties. We will pursue the enforcement remedies best suited to the circumstances of the case and what we want, and are able, to achieve.

We can take enforcement action designed to punish wrongdoers, protect investors, preserve assets, correct disclosures and compensate people. We can also try to resolve matters through negotiation or issuing infringement notices.'

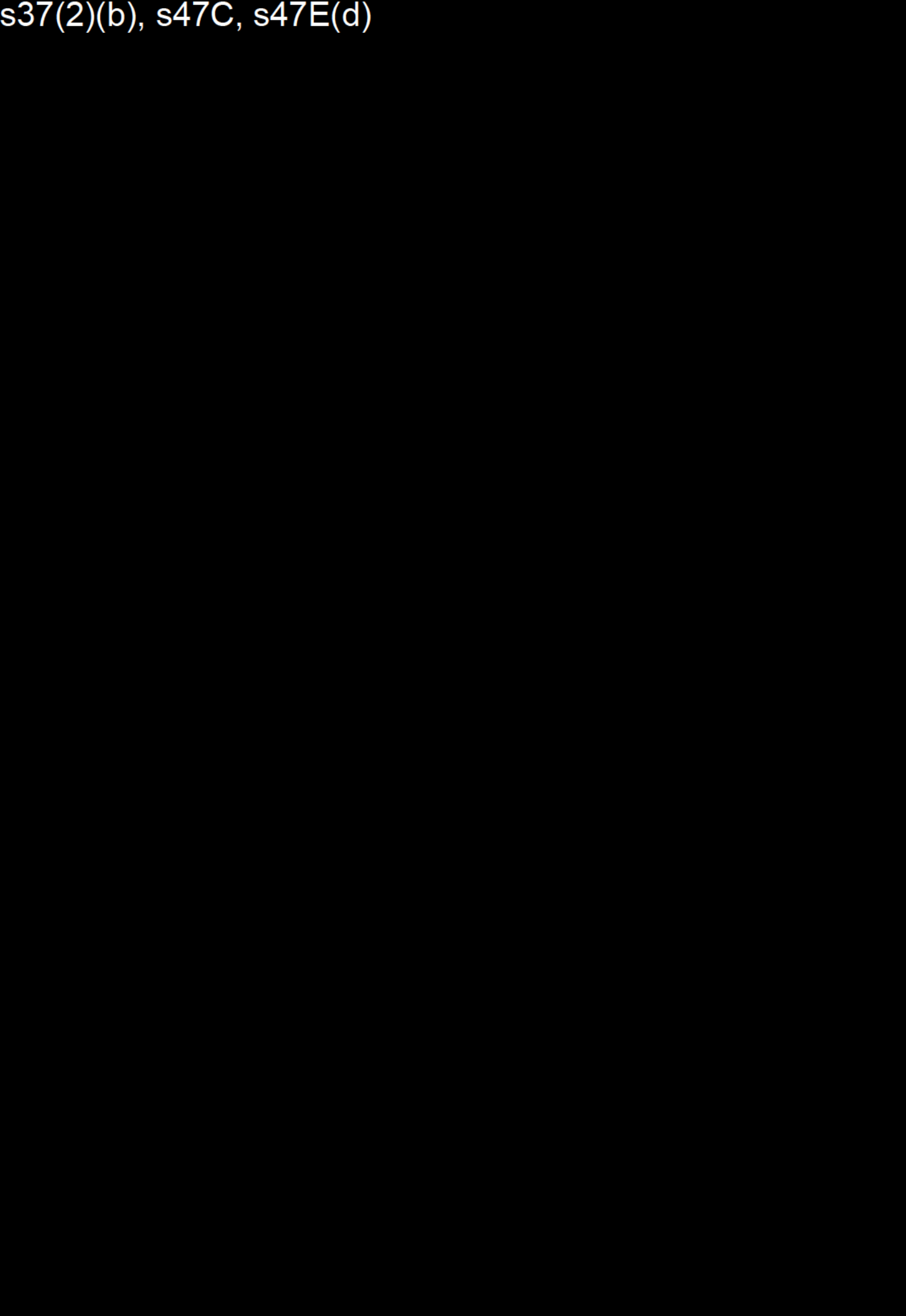
s37(2)(b), s47C, s47E(d)



s37(2)(b), s47C, s47E(d)



s37(2)(b), s47C, s47E(d)



s37(2)(b), s47C, s47E(d)

35. The grant of an AFSL to Trio Capital, including the appointment of Shawn Richard as a responsible officer, was considered in detail in the PJC report.¹⁷ In particular, consideration was given to submissions made by

s37(2)(b), s47C, s47E(d)

¹⁷ PJC report, pp 79-83, 116-118, 127-128,

ASIC about the adequacy of licensing arrangements at the time, and the regulatory arrangements for entities regulated by both ASIC and APRA.

36. As acknowledged in the PJC report, ASIC's submissions to the PJC emphasised that there were limitations provided by the AFSL regime at the relevant time, which set the threshold for obtaining an AFSL relatively low and the threshold for cancelling an AFSL relatively high, and focused on the licensed entity rather than the directors, employees or other representatives.¹⁸
37. The PJC report acknowledged the difficulties with the licensing system in place at the time,¹⁹ but did not make any criticism of ASIC regarding the grant of an AFSL to Trio Capital. Relevant provisions of the Corporations Act were subsequently amended to give ASIC greater discretion in granting and cancelling AFSLs. However, as stated by ASIC in its submission to the inquiry, while the amendments may have enabled ASIC to act at an earlier stage had they been enacted at that time, they would not necessarily have prevented investor losses.²⁰

Conclusion

38. While ASIC acknowledges the difficult circumstances described in the statements accompanying the Applications, and the substantial impact that the loss of their investments has had on the Applicants, ASIC considers that the Applicants' loss was the regrettable result of the fraudulent conduct by Trio Capital. ASIC also notes and endorses the comments made in the APRA submissions concerning the role of a regulator more generally.
39. ASIC would be happy to provide any further information which may assist Finance in its consideration of these applications.

Yours faithfully,

s22(1)(a)(ii)

Senior Lawyer

Australian Securities and Investments Commission

Annexure A: Overview of ASIC's Enforcement Outcomes

Annexure B: ASIC, Policy Statement 164 Licensing: Organisational capacities (issued 28 November 2001; updated on 8 November 2002)

¹⁸ PJC report pp 79-80.

¹⁹ PJC report p 128.

²⁰ PJC report p 81.

Annexure A

Overview of ASIC's Enforcement Outcomes

ASIC's enforcement outcomes include:

- Shawn Richard, former investment manager of ASF, being sentenced to 3 years and 9 months jail with a minimum of 2 years and 6 months. ASF was one of the managed investment schemes operated by Trio. Mr Richard pleaded guilty to two offences involving dishonest conduct in carrying on a financial services business. Mr Richard also admitted to making a false statement about a financial product.
- The sentencing of Tony Maher (changed his name from Paul Gresham) to 25 months jail with a non-parole period of 15 months. Mr Maher was the investment manager of ARP, a managed investment scheme operated by Trio. Mr Maher pleaded guilty to 20 charges of making false or misleading statements to obtain a financial advantage.
- The permanent banning of Eugene Liu, ASF's chief investment strategist, from providing financial services.
- Enforceable Undertakings with five former Trio directors by which they agreed not to be involved in the financial services industry or manage a company for between two and 15 years. The former directors are Natasha Beck, Keith Finkelde, David O'Bryen, David Andrews and Rex Phillpott.
- An Enforceable Undertaking with planning firm Kilara Financial Solutions to address compliance issues.
- An Enforceable Undertaking with Tony Maher to never provide financial services or manage a company.
- Suspending the licence of financial planners Seagrims, and subsequent cancellation of this licence at the company's request on 19 September 2011.
- Banning Seagrims directors Peter Seagrim and Anne-Marie Seagrim for three years. Their bans were subsequently reduced to 6 months by the Administrative Appeals Tribunal (**AAT**) on review.
- An Enforceable undertaking with former ASF auditor Timothy Frazer, that he would not act as a registered company auditor for three years.
- Banning Ross Tarrant from providing financial services for 7 years, a ban that was subsequently upheld by the AAT. Mr Tarrant's appeal to the Full Court of the Federal Court was unsuccessful.
- Permanent banning of Jeffrey Revell-Reade from providing financial services in Australia.

Some of the Enforcement Outcomes in Detail

Richard

- Shawn Richard served his minimum jail term of two and a half years and was released from prison on 20 January 2014.
- This sentence was imposed after Mr Richard pleaded guilty to 2 offences involving dishonest conduct in carrying on a financial services business. Mr Richard also admitted to making a false statement about a financial product.
- Mr Richard entered into an Enforceable Undertaking with ASIC on 3 December 2010 and has permanently undertaken not to participate in the Australian financial services industry.

Maher

- On 27 June 2014 Tony Maher, the former director of the investment manager of ARP was sentenced in the District Court of New South Wales to a total of 25 months imprisonment with 15 months to be served before he is eligible for parole.
- This sentence was imposed after Mr Maher pleaded guilty to 20 criminal charges including publishing false statements for the purpose of obtaining a financial advantage.
- In February 2012 ASIC accepted an Enforceable Undertaking from Maher that he would not ever again work in the Australian financial services industry or manage a corporation.

Liu

- On March 2013, an ASIC delegate permanently banned Eugene Liu, the former Chief Investment Strategist for ASF from providing financial services.
- Mr Liu sought a review of the decision to ban him in the AAT. On 31 October 2014 the AAT affirmed the decision of ASIC's delegate to ban him permanently.

Tarrant

- Ross Tarrant was the sole director and authorised representative of a financial services business operating in Wollongong which invested more than \$23 million of its clients' funds in the ASF.
- On 8 January 2014, the AAT affirmed ASIC's decision to ban Mr Tarrant from providing financial services for 7 years.
- Mr Tarrant was banned on the basis that he failed to disclose in statements of advice that he was receiving a marketing allowance from Shawn Richard; and failing to have a reasonable basis for the advice he provided to 8 clients.
- Mr Tarrant then appealed the AAT's decision to the Full Court of the Federal Court.
- The Full Court handed down its decision on 6 February 2015. The Full Court dismissed Mr Tarrant's appeal as they did not identify any error of law by the AAT and the 7 year ban stands.

Revell-Reade

- On 5 May 2015, ASIC served an order on Jeffrey Revell-Reade banning him permanently from providing financial services in Australia.
- Revell-Reade is currently serving a 9 and half year sentence in the UK for his involvement in a conspiracy to defraud UK investors through the mis-selling of shares through boiler rooms operating from Spain.
- Revell-Reade is an Australian citizen and is likely to be deported to Australia on his release (either at the end of his sentence or on parole).

- Revell-Reade was banned from providing financial services in Australia on the basis of his conviction in the UK.