



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

By email: foi+request-10638-8bb7fb79@righttoknow.org.au

Our Reference: FOI 177-2023

13 September 2023

Dear Mr Sweeney

Freedom of Information Request No. 177-2023

Acknowledgement of Request

I refer to your request dated 30 August 2023 under the *Freedom of Information Act 1982 (FOI Act)* in which you seek access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**).

Your request seeks access to the following:

"Dear Australian Securities and Investments Commission,

In 2014 the SENATE ECONOMICS REFERENCES COMMITTEE undertook an "Inquiry into the performance of ASIC".

Included in the "Questions on notice for ASIC" was a question from the Committee related to a Defined Benefit Regulated Superannuation Fund that was constituted and established by a Trust Deed made on 23 December 1913 and which was closed to new members on 30 November 1997. This fund is legally identified by the original Trust Deed and not by the various "names of convenience" used over the last century which have included "The Provident Fund".

This superannuation fund was established as a "private trust" but became a Regulated Superannuation Fund in 1994 and was registered by APRA in 2006.

The Senate Committee sought a response from ASIC related to:

"Submissions 277, 109, 133 and 146) – The Provident Fund The committee has received several submissions regarding the Provident Fund, an employee benefit fund (superannuation fund) that was established in 1913. The submissions claim that qualifying male officers are entitled to a pension for life and their widows are then entitled to a survivorship pension. The submissions allege that the original trust deed was fraudulently altered and the conditions of the original trust deed are not being complied with (i.e. the pensions are not being paid)."

If pensions are not being paid then is is an ongoing offence, since former trustees cannot pay benefits that fall due after the trustee has retired from the office of trustee. The incumbent trustee must pay pensions from the date that the trustee accepted the office of trustee.

The following three paragraphs are extracts from the response from ASIC to the Senate Committee:

"In this regard, the Reporters have alleged that the trust deed has been illegitimately altered since the Fund's inception in 1913 to the detriment of members' benefits. As a result of this conduct, the Reporters consider that changes to the trust deed were not legally effective, meaning that the trust deed which was used to calculate their payouts is not effective.

As a result, a large number of the complaints received by ASIC concerning the Fund have been in relation to the Reporters' attempts to access trust deeds for the Fund dating back to its inception. The Reporters are of the view that the trustee is obliged to provide access to these documents under section 1017C of the Act. In considering all the complaints received, ASIC has determined that no further action is required in relation to these matters because, variously:

- there was insufficient evidence of breaches of the laws we administer;*
- ASIC did not have jurisdiction to pursue these matters (such as to enforce any obligations under private trust or contractual arrangements or under state-based trust law);*
- ASIC did not exist at the time the alleged misconduct occurred and ASIC is statute barred from taking criminal action in relation to conduct occurring more than five years previously; or*
- in some instances, ASIC considered that the Reporters' allegations or their understanding of the law were misconceived"*

It is a Contempt of the Senate to provide false or misleading oral or written testimony to a Senate Inquiry.

Any false or misleading testimony should be corrected by sending a "correction to testimony" letter to the Committee Secretary.

In 2014 this particular Defined Benefit Regulated Superannuation Fund was administered by PFS Nominees Pty Ltd, who administered this fund until 30 June 2016, when NULIS Nominees (Aust) Ltd took over the administration of this fund. Both trustees had the same Chair (Nicole Susan Smith) and the same Directors.

The former Chair of NULIS, Nicole Susan Smith testified on 8 August 2018 before Royal Commissioner Hayne as follows:

"Did you think yourself that taking money to which there was no entitlement raised a question of the criminal law?" Mr Hayne asked.

"I didn't," Ms Smith responded.

<https://www.abc.net.au/news/2018-08-08/nab-didnt-consider-whether-wrongly-charging-fees-was-a-crime/10089990>

Following this testimony ASIC commenced proceedings in the Federal Court where Justice Yates in the Federal Court fined NULIS for failing to act honestly in the administration of another fund {ASIC v NULIS Nominees (Aust) Ltd et Al [2020] FCA 1306} and for engaging in misleading as deceptive conduct.

So clearly ASIC would have had jurisdiction (second reason) with respect to the previous trustee PFS Nominees (Aust) Ltd, which contradicts the second reason provided in the written testimony to the committee above.

In any event, Sub-section 13(1)(b) of the ASIC Act 2001 provides:

(1) ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions) where it has reason to suspect that there may have been committed:

.....

(b) a contravention of a law of the Commonwealth, or of a STATE or Territory in this jurisdiction, being a contravention that:

(i) concerns the management or affairs of a body corporate or managed investment scheme; or

(ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.

The fourth reason provided to the Committee is an example of "victim blaming" - if the "Reporters' allegations or their understanding of the law were misconceived" why were not details provided to the Committee? It is a trustee's plainest duty to obey the terms of the trust, and to seek Judicial Advice if any difficulty arises in understanding the terms of the trust (governing rules) to protect not only the beneficiaries but the trustee as well who has a personal liability for any breach of trust (contravention of the governing rules), unless excused by the Court.

The third reason does not apply to the incumbent trustee, who has failed to make pension payments from the date that the trustee accepted the office of trustee, since the breach of trust (contravention of the governing rules) is an ongoing offence as is the concealment of the genuine Deeds from fund members and beneficiaries (eg widows).

As to the first reason of "insufficient evidence of breaches of the laws we administer", ASIC admitted "a large number of the complaints received by ASIC concerning the Fund have been in relation to the Reporters' attempts to access trust deeds for the Fund dating back to its inception", ASIC should have advised the Committee that it is a criminal offence for a trustee of a Regulated Superannuation Fund, to contravene subsection 1017C(5) of the Corporations Act 2001 (administered by ASIC) and related Regulations 7.9.45 that requires trustees to provide access to the original Trust Deed and all amending Deeds as well as access to the most recent actuarial report and financial statements of the fund.

The maximum penalty is two years imprisonment.

ASIC had the power to obtain all the necessary evidence - copies of all of the Deeds of the fund, but failed to do so.

In 2011, ASIC had given an undertaking to the Federal Court (VID 323 of 2011) to further investigate allegations of maladministration of this particular Defined Benefit fund.

The document I seek is a copy of any correspondence sent to the Committee Secretary of the Senate Economics Reference Committee by ASIC correcting any or all of the four responses listed above.

The search period is from 1 January 2014 to the present.

Yours faithfully,

P. C. Sweeney"

As your request was received on 30 August 2023 and the 30-day statutory period for processing the request commenced on the day after the date of receipt, you should therefore expect a decision to be made by 29 September 2023.

The 30-day processing period may be extended should ASIC find it is necessary to consult third parties, where a charge is to be imposed on the processing of the request or for other reasons. You will be advised if there are changes to the 30-day processing period.

Please note that any documents released to you under the FOI Act may later be published online on the ASIC disclosure log in accordance with our obligation to do so under the Act. This requirement to publish released documents is subject to certain exceptions for example, personal or business information will not be published where it would be unreasonable.

If you have any questions or wish to discuss, please contact me at krystal.fung@asic.gov.au.

Yours sincerely,

A handwritten signature in black ink that reads "krystal fung". The signature is written in a cursive, lowercase style.

Krystal Fung
(Authorised decision maker under section 23(1) of the FOI Act)
For the Australian Investments & Securities Commission