



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

20 September 2023

Dear Mr Sweeney

Freedom of Information Request No. 177-2023

Notice of Access Decision

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"

I am the authorised decision-maker for the purposes of section 23 of the FOI Act and this letter gives notice of my decision.

Information considered:

In reaching my decision, I have considered the following:

- the FOI Act, in particular s 24A;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- the terms of your request; and
- the details of the searches conducted by ASIC staff.

Decision and reasons for the decision

Section 24A of the FOI Act

Section 24A of the FOI Act, provides:

Requests may be refused if documents cannot be found, do not exist or have not been received

Document lost or non-existent

- (1) An agency or Minister may refuse a request for access to a document if:
- (a) all reasonable steps have been taken to find the document; and
 - (b) the agency or Minister is satisfied that the document
 - (i) is in the agency's or Minister's possession but cannot be found; or
 - (ii) does not exist.

The FOI Guidelines relevantly provide:

Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents;*
- *the current and past file management systems and the practice of destruction or removal of documents;*
- *the record management systems in place;*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.¹*

Searches were conducted by ASIC's Misconduct & Breach Reporting team and Superannuation and Life Insurance team for documents in response to your request. Searches were conducted on ASIC's record management system and email inboxes

¹ FOI Guidelines [3.89].

of staff involved in preparing the responses to the QoN at the time. The teams have advised that no documents falling within the terms of your request were identified.

My decision is therefore to refuse your request for access to documents under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find the document(s) that fall within the scope of your request. I am satisfied that the document(s) do not exist. I have therefore decided to refuse your request pursuant to section 24A(1)(b)(ii) of the FOI Act.

Review rights

In the event that you are dissatisfied with the decision:

1. You may, within 30 days after the day on which you have been notified of this decision, apply in writing to ASIC for an internal review of my decision under section 54B of the FOI Act. This review is an independent process conducted by a Senior Freedom of Information Officer at ASIC. This request should be addressed to me or to the Senior Manager, Freedom of Information, GPO Box 9827, Brisbane QLD 4001 or by email to foirequest@asic.gov.au.
2. You may within 60 days after the day on which you have been notified of this decision, apply in writing to the Office of the Australian Information Commissioner (**OAIC**) for a review of my decision under section 54N of the FOI Act. You may contact the OAIC by post at GPO Box 5218 Sydney NSW 2001, by email at enquiries@oaic.gov.au or by telephone on 1300 363 992.

Right to complain

3. You may lodge a complaint with the OAIC in relation to the conduct of ASIC in the handling of this request. You may contact the OAIC as set out above.

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

Yours sincerely,



Krystal Fung
(Authorised decision maker pursuant to subsection 23(1) of the FOI Act)
For the Australian Securities and Investments Commission