



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

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Our Reference: FOI 178-2023

13 September 2023

Dear Mr Sweeney

Freedom of Information Request No. 178-2023

Acknowledgement of Request

I refer to your request dated 4 September 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 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.

One of the reasons given to the Senate Committee in written testimony by ASIC was the following;

“• in some instances, ASIC considered that the Reporters' allegations or their understanding of the law were misconceived”

This 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.

Several members of this fund (who have the legal status of “pensioner members”) as well as a wife of one member contacted former Senator John Williams who was a member of the Senate Economics Reference Committee seeking the assistance of the Senator.

In a letter dated 17 January 2014 (ASIC Reference CCU-14\0006} addressed to Senator Williams, Belinda Taneski, Senior Manager, Misconduct and Breach Reporting (who was responding on behalf of Warren Day who was on leave) made the following representation:

“In this regard, we note that [name of fund member] is no longer a member of the Fund (since having received his payout). We also note that, from the information available to ASIC [name of fund member] was not a member of the Fund when old trust deeds were in force, and we would expect any rights under those old trust deeds would not be available to him and therefore not be available to his wife or widow”.

Note: Regulation (Rule 30A) provides a “Survivorship Pension” to widows of male fund members.

The words “from information available to ASIC” means “this is what the trustee told us”, since ASIC never obtained copies of the original Trust Deed or any amending Deeds as supporting evidence.

This representation to Senator Williams was a confirmation of a “Deed Substitution Fraud” where the “old trust deeds”, which provide benefits of a value four to five times higher, are ignored by the incumbent trustee who instead relies on “new trust deeds”, providing much lower benefits or no benefit (eg survivorship pension for widows) .

There is no such things as “old trust deeds”.

A superannuation fund is constituted and established by an original Trust Deed (unless established by statute).

If an amending power has been reserved in the original Trust Deed then this power may be exercised in subsequent amending Deeds to increase benefit entitlements, with the original Trust Deed and all valid amending Deeds being read as one legal document (ie the “Trust Deed”).

However, if a purported amending Deed purports to reduce or eliminate an entitlement, then such an amending Deed would be invalid under the equitable doctrine of a “Fraud on a Power” as confirmed by the High Court in Metropolitan Gas Company v Federal Commissioner of Taxation [1932] HCA 58; (1932) 47 CLR 621.

Prior to 1 July 2019, ASIC officers were subject to the APS Code of Conduct (Section 13 of the Public Service Act 1999) and subsection 13(9) states:

"An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment."

The document I seek is a copy of any correspondence sent to Senator John Williams or the the Committee Secretary of the Senate Economics Reference Committee by ASIC correcting the "false or misleading information to a request for information" in the representation by Ms Tanski on behalf of Warren Day.

An admission of a "Deed Substitution Fraud" by Ms Taneski to former Senator Williams is no trivial matter, since there is no such thing as "old trust deeds" – there is only the original Trust Deed and then valid or invalid amending Deeds.

The original Trust Deed dated 23 December 1913 and all valid amending Deeds were also criminally concealed from APRA in 2006 in order to obtain fund registration which further confirms that there is no such thing as "old trust deeds".

A document dated 26 August 1986 bearing the signature of a convicted fraudster was misrepresent to AFCA as the "Trust Deed" of this fund.

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

Yours faithfully,

P.C. Sweeney"

As your request was received on 4 September 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 4 October 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,



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