



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

By email: foi+request-10658-6a7ae8f4@righttoknow.org.au

Our Reference: FOI 178A-2023

20 September 2023

Dear Mr Sweeney

Freedom of Information Request No. 178A-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"

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 Government Relations team for documents in response to your request. Searches were conducted on ASIC's internal CCU databases for "CCU14\006", "Senator John Williams" and "Belinda Taneski" and also on Sharepoint Online (ASIC's record management system). 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.

¹ FOI Guidelines [3.89].

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 pursuant to subsection 23(1) of the FOI Act)
For the Australian Securities and Investments Commission