



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

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Our Reference: FOI 191-2023

13 September 2023

Dear Mr Sweeney

Freedom of Information Request No. 191-2023

Acknowledgement of Request

I refer to your request dated 8 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

innumbent trustee must pay pensions from the date that the trustee accepted the office of trustee.

In ASIC's written testimony to the Committee the following was stated:

"ASIC notes that a large number of the complaints and FOI requests received in relation to the Fund have not principally concerned allegations of fraudulent behaviour, but rather allegations that the trustee of the Fund has failed to comply with its disclosure obligations under section 1017C of the Act. Section 1017C of the Act requires trustees to provide a concerned person – typically a member of the fund within the preceding 12 months – with certain information, including information they reasonably require for the purposes of understanding any benefit entitlements that they may have under the relevant superannuation product."

Now ASIC only makes reference to the provisions of Subsection 1017C(2) of the Corporations Act 2001 which is more relevant to members of Defined Contribution funds.

ASIC fails mention the provisions of Subsection 1017C(5) of the Corporations Act and related Regulation 7.9.45 and the penalty of two years imprisonment for the contravention of this subsection in Schedule 3 of the Corporations Act 2001 which is relevant to members and beneficiaries (eg widows) of Defined Benefit funds.

Trustees must provide a copy of the original Trust Deed that constituted and established the fund as well as copies of any amending Deeds following a written request by a person with a "beneficial interest" in the fund.

Why did ASIC seek to conceal this important information from the Senate Committee?

In a letter dated 11 February 2014 to former Senator John Williams, Gerard Fitzpatrick, Senior Executive Leader, Investment Managers and Superannuation also attempted to mislead the Senator as to the provisions of Ssection 1017C of the Corporations Act 2001.

Mr Fitzpatrick was caught out and had to correct his misleading letter of 11 February 2014 in a letter dated 3 March 2014 and advise the Senator of the provisions of Subsection 1017C(5).

In this second letter Mr Fitzpatrick states:

"We understand that the Previous Trustee also took the view that access to copies of the earlier trust deeds was not available under subsection 1017C(2). For the reasoning set out above, access to copies of earlier trust deeds is unlikely to be available under subsection 1017C(5) and associated regulations."

There are no such thing as "earlier trust deeds"

There is an original Trust Deed that constituted and established the trust (fund) and if an amending power was reserved in the original Trust Deed then the provisions of the original Trust Deed may be amended to improve benefit entitlements, but not decrease or eliminate benefits.

The original Trust Deed and all VALID amending Deeds must be read as "one legal document" and a trustee should seek judicial advice if any doubt arises in reading these deeds a "one legal document".

If a trustee has been engaged in a "Deed Substitution Fraud" and paying much lower benefits than prescribed in the original Trust Deed and VALID amending Deeds, with a later dated fraudulent document represent as the "Trust Deed", then the trustee would not want fund members and beneficiaries having access to the genuine deeds that would confirm a major fraud.

Mr Fitzpatrick in his letter dated 3 March 2014 to Senator John Williams essentially confirmed that members and beneficiaries of this particular Defined Benefit fund had been the victims of a "Deed Substitution Fraud", where widows of former members get no benefits and members only get a benefit worth around 20% of their lawful entitlement based on average life expectancy.

If ASIC had enforced subsection 1017C(5) of the Corporations Act 2001 with a direction to PFS Nominees Pty Ltd (purported trustee from 20 January 2014 to 30 June 2016) and to NULIS Nominees (Aust) Ltd (purported trustee from 1 July 2016 to the present) to comply with subsection 1017C(5), then the "Deed Substitution Fraud" would have been quickly exposed.

Royal Commissioner Hayne stated the following in his Final Report in section 3.1:

"ASIC is charged with enforcing financial services laws on behalf of the community. One of ASIC's objectives is to 'Take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth'. The community is entitled to expect and does expect, that financial services entities will comply with those laws."

In his letter dated 3 March 2014, Mr Fitzpatrick made no mention to Senator Williams that the maximum penalty for a contravention of Subsection 1017C(5) of the Corporations Act 2001 is two years imprisonment

The document I seek is a copy of any correspondence from Gerard Fitzpatrick (or other ASIC Officer) to Senator Williams further clarifying the 3 March 2014 letter which itself had clarified the 11 February 2014 letter.

The search period is from 3 March 2014 to the present.

Yours faithfully,

P.C. Sweeney"

As your request was received on 8 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 9 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,

A handwritten signature in black ink, appearing to read 'Krystal Fung'. The signature is written in a cursive, flowing style.

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