

**NOTICE OF DECISION MADE UNDER SECTION 23  
OF THE FREEDOM OF INFORMATION ACT 1982 (CTH) (FOI ACT)  
WITH REASONS FOR DECISION PROVIDED UNDER SECTION 26**

- Applicant:** Phillip Sweeney
- Decision-maker:** Lauren Willars, an authorised officer of the Australian Prudential Regulation Authority (**APRA**) for the purposes of section 23(1) of the FOI Act.
- Relevant documents:** Request for documents relating to a copy of the Trust Deed of the MLC Super Fund lodged with APRA as well as a copy of the decision of APRA to register this fund in 2016.
- My decision:** *Grant access*, under section 11A(3) of the FOI Act, to the documents specified in the attached Schedule.

**MATERIAL FACTS**

1. I refer to your email dated 13 August 2018, in which you sought access under the FOI Act to:

*“The conduct of the corporate Trustee, NULIS Nominees (Australia) Ltd, has been the focus of attention at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.*

*NULIS is the trustee of a new superannuation fund established in 2016, the MLC Super Fund.*

*APRA would need to register this fund and pursuant to Section 29L of the SIS Act, NULIS would be required to lodge a copy of the Trust Deed with APRA.*

*The documents I seek are a copy of the Trust Deed of the MLC Super Fund lodged with APRA as well as a copy of the decision of APRA to register this fund in 2016”*

(your **FOI request**).

2. By email dated 15 August 2018, APRA acknowledged receipt of your request.

**DOCUMENTS RELATING TO THIRD PARTIES**

3. The Applicant’s request is for documents that contain information relating to the business affairs of an APRA-regulated entity. Therefore, APRA extended the statutory timeline until 13 October 2018 under section 27 of the FOI Act to allow APRA time to consult with the entity.

## EVIDENCE AND MATERIAL RELIED ON

4. In making my decision, I have relied on the following evidence and material:
  - a) the Applicant's request received by APRA on 13 August 2018;
  - b) acknowledgment email from FOI Officer to the Applicant dated 15 August 2018;
  - c) email from FOI Officer notifying the applicant of the third party consultation on 7 September 2018;
  - d) email correspondence between the relevant trustee and APRA in September 2018;
  - e) relevant sections of the *Australian Prudential Regulation Authority Act 1998* (Cth) (**APRA Act**);
  - f) relevant sections of the FOI Act; and
  - g) guidelines issued by the Office of the Australian Information Commissioner to date (**FOI Guidelines**).

## REASONS FOR DECISION

5. APRA has conducted all reasonable searches of its records and identified all documents relevant to your FOI request (**relevant documents**).
6. APRA consulted the trustee of the MLC Super Fund. The trustee did not object to the disclosure of the relevant documents.
7. I have therefore decided to grant access to the relevant documents.
8. A list of the relevant documents is set out in the attached **Schedule**.

## ADVICE TO APPLICANT AS TO RIGHTS OF REVIEW

### *Application for Internal Review of Decision*

9. Pursuant to section 54 of the FOI Act, you have the right to apply for an internal review of the decision if you disagree with my decision. If you make an application for review, another officer of APRA will be appointed to conduct a review and make a fresh decision on the merits of the case.
10. Pursuant to section 54B of the FOI Act, you must apply in writing for a review of the decision within 30 days after the day the decision has been notified to you.
11. You do not have to pay any other fees or processing charges for an internal review, except for providing access to further material in the document released as a result of the review (for example, photocopying, inspection, etc).

12. No particular form is required to apply for review although it is desirable (but not essential) to set out in the application the grounds on which you consider that the decision should be reviewed.

13. Application for an internal review of the decision should be addressed to:

*FOI Officer  
Australian Prudential Regulation Authority  
GPO Box 9836, Sydney NSW 2001  
Telephone: (02) 9210 3000  
Facsimile: (02) 9210 3411*

14. If you make an application for internal review and we do not make a decision within 30 days of receiving the application, the agency is deemed to have affirmed the original decision. However, under section 54D of the FOI Act, APRA may apply, in writing to the Information Commissioner for further time to consider the internal review.

### ***Application for review by Information Commissioner***

15. Pursuant to section 54L of the FOI Act, you have the right to apply to the Information Commissioner for a review of the original decision or a review of a decision made on review.

16. Any application must be in writing and must give details of an address where notices may be sent and include a copy of the original decision or the decision made on internal review.

17. An application for review by the Information Commissioner should be sent:

- Online: [www.oaic.gov.au](http://www.oaic.gov.au)
- Post: GPO Box 5218, Sydney NSW 2001
- Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)
- In person:

*Office of the Australian Information Commissioner  
Level 3, 175 Pitt Street  
Sydney NSW 2000*

### ***Application for review by Administrative Appeals Tribunal***

18. If the decision on review by the Information Commissioner is not to grant access to all of the documents within your request, you would be entitled to seek review of that decision by the AAT.

19. The AAT is an independent review body with the power to make a fresh decision. An application to the AAT for a review of an FOI decision does not attract a fee. The AAT cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the AAT on 1300 366 700.

### ***Complaints to the Information Commissioner***

20. You may complain to the Commissioner concerning action taken by this agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. The Commissioner will conduct an independent investigation of your complaint.
21. You may complain to the Commissioner either orally or in writing, by any of the methods outlined above, or by telephone, on 1300 363 992.



Lauren Willars  
FOI Officer  
Australian Prudential Regulation Authority  
Date: 4 October 2018

**Schedule of documents to be released**

| <b>Document number</b> | <b>Document title</b>                                    | <b>Date</b> |
|------------------------|--|-------------|
| Document 1             | MLC Super Fund Trust Deed                                | 9 May 2016  |
| Document 2             | Decision to register a registrable superannuation entity | 8 June 2016 |

## **FREEDOM OF INFORMATION ACT 1982 (CTH)**

### **11A Access to documents on request**

#### *Scope*

- (1) This section applies if:
  - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
    - (i) a document of the agency; or
    - (ii) an official document of the Minister; and
  - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

#### *Mandatory access—general rule*

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

#### *Exemptions and conditional exemptions*

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
  - (a) a conditionally exempt document; and
  - (b) an exempt document:
    - (i) under Division 2 of Part IV (exemptions); or
    - (ii) within the meaning of paragraph (b) or (c) of the definition of *exempt document* in subsection 4(1).

## 24A 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.

### *Document not received as required by contract*

- (2) An agency may refuse a request for access to a document if:
  - (a) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document; and
  - (b) the agency has not received the document; and
  - (c) the agency has taken all reasonable steps to receive the document in accordance with those contractual measures.

## 27 Consultation—business documents

### *Scope*

- (1) This section applies if:
  - (a) a request is made to an agency or Minister for access to a document containing information (***business information***) covered by subsection (2) in respect of a person, organisation or undertaking; and
  - (b) it appears to the agency or Minister that the person, organisation or proprietor of the undertaking (the ***person or organisation concerned***) might reasonably wish to make a contention (the ***exemption contention***) that:
    - (i) the document is exempt under section 47 (trade secrets etc.); or
    - (ii) the document is conditionally exempt under section 47G (business information) and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (2) This subsection covers the following information:
  - (a) in relation to a person—information about the person's business or professional affairs;
  - (b) in relation to an organisation or undertaking—information about the business, commercial or financial affairs of the organisation or undertaking.
- (3) In determining, for the purposes of paragraph (1)(b), whether the person or organisation concerned might reasonably wish to make an exemption contention because of business information in a document, the agency or Minister must have regard to the following matters:
  - (a) the extent to which the information is well known;
  - (b) whether the person, organisation or undertaking is known to be associated with the matters dealt with in the information;
  - (c) the availability of the information from publicly accessible sources;

(d) any other matters that the agency or Minister considers relevant.

*Opportunity to make submissions*

- (4) The agency or Minister must not decide to give access to the document unless:
- (a) the person or organisation concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
  - (b) the agency or the Minister has regard to any submissions so made.
- (5) However, subsection (4) only applies if it is reasonably practicable for the agency or Minister to give the person or organisation concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

*Notice of decision to give access*

- (6) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:
- (a) the person or organisation concerned;
  - (b) the applicant.

*Access not to be given until review or appeal opportunities have run out*

- (7) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person or organisation concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have **run out**, see subsection 4(1).

*Notice and stay of decision not to apply unless submission made in support of exemption contention*

- (8) Subsections (6) and (7) do not apply unless the person or organisation concerned makes a submission in support of the exemption contention as allowed under paragraph (4)(a).

*Edited copies and business information*

- (9) This section applies:
- (a) in relation to an edited copy of a document—in the same way as it applies to the document; and
  - (b) in relation to a document containing business information—to the extent to which the document contains such information.