



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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21 August 2020

Phillip Sweeney

By email only: foi+request-6582-9a83c627@righttoknow.org.au

Dear Mr Sweeney

Freedom of Information Request No. FOI 155-2020

Acknowledgement of Request

I refer to your request received by ASIC on 7 August 2020 under the *Freedom of Information Act 1982 (FOI Act)* in which you have sought information from the Australian Securities and Investments Commission (**ASIC**).

Your email seeks access to the following:

'The Parliament of Australia has given ASIC the power {or standing} to enforce the provisions of the Corporations Act 2001 and associated Regulations.

The contravention of some provisions of the Corporations Act 2001 is an offence which has a criminal penalty listed in Schedule 3, while the contravention of other provisions does not have an associated penalty.

For, example subsection 912(A) requires a financial services licensee to:

"(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly".

This might be termed a "shades of grey" provisions since it is not easy to prove in many cases that there has been a contravention of this provisions and so no penalty is provided in Schedule 3 for a contravention of subsection 912(A).

However, a maximum penalty of two years imprisonment is prescribed in Schedule 3 for the contravention of what might be termed a "black and white" provision - the failure to provide a statement to ASIC following a direction from ASIC – subsection 912(C).

Similarly, another "black and white" provision is the failure of a trustee of a regulated superannuation fund to provide a copy (or access to) a fund document to a member or beneficiary that is prescribed in subsection 1017C(5) of the Act and associated Regulation 7.9.45.

For example, a trustee officer who failed to provide a copy of the “audited accounts of the fund” { Regulation 7.9.45 (2)(b)} to a “concerned person” upon a written request is subject to a maximum penalty of two years imprisonment as listed in Schedule 3.

The prescribed document has either:

- (i) Been provided within the prescribed time period {or allowed to be photocopied} after the written request has been received; or*
- (ii) No copy or access has been provided.*

This is a “black and white” provision.

In a letter dated 5 September 2019 {ASIC Ref: CCU-18\0397} to a former chair of the Standing Committee of Economics, Warren Day {Now an Executive Director of ASIC} made the following representation:

“We encourage Mr Sweeney to seek legal advice about pursuing any private rights that may be available to him”

The actual complaint to Mr Day in 2009 was that the purported trustee of the regulated superannuation fund in which my wife and I have a beneficial interest had contravened subsection 1017C(5) by failing to allow access to fund documents prescribed by Regulation 7.9.45.

The document or documents I seek are documents in the possession of ASIC that would confirm that a member of the public has standing {a “private right”} to commence criminal proceedings against a trustee of a regulated superannuation fund if the statement of claim alleges one or more contraventions of the provisions of the Corporations Act 2001 to which criminal sanctions apply as contained in Schedule 3 of the Act.’

As your request was received by ASIC on 7 August 2020 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 7 September 2020.

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 on Jessica.Zhang@asic.gov.au or (03) 9280 4156.

Yours sincerely,

Jessica Zhang

Freedom of Information Officer

(Authorised decision maker under section 23(1) of the FOI Act)