



CDPP

Australia's Federal Prosecution Service

**Commonwealth Director
of Public Prosecutions**

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Your Reference:

Our Reference:

7 September 2020

Phillip Sweeney
foi+request-6583-17be82b6@righttoknow.org.au

Dear Mr Sweeney

**FREEDOM OF INFORMATION (FOI) REQUEST - NOTICE OF DECISION UNDER SECTION 26 OF THE
FREEDOM OF INFORMATION ACT 1982 (FOI ACT)**

I refer to your email of 7 August 2020 in which you requested access to:

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

In the case of criminal misconduct, ASIC might produce a "Brief of Evidence" for the Office of the Commonwealth Director of Public Prosecutions.

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 the Office of the Commonwealth [sic] Director of Public Prosecutions {CDPP} that would confirm that a member of the public has standing {a “private right”} to:

- (i) commence criminal proceedings against a trustee of a regulated superannuation fund, or*
- (ii) provide a “Brief of Evidence” to the CDPP*

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.

AUTHORISATION

I am a person authorised by the Director of Public Prosecutions to make decisions on requests for access to documents under the FOI Act. My name and position are:

Kirstin Duncan
Senior Federal Prosecutor
Canberra Office

DECISION AND REASONS FOR DECISION

In considering your application, I have taken the following into account:

- The terms and scope of your request
- The FOI Act
- The guidelines issued by the Australian Information Commissioner under s93A of the FOI Act (available at www.oaic.gov.au).

DECISION

Your request contained references to legislation and assertions which I have not used to inform my interpretation of your request.

I consider your request to be a request for documents of the Commonwealth Director of Public Prosecutions (CDPP) which set out an individual's right to bring a private prosecution for a criminal offence or provide a brief of evidence to the CDPP.

You refer to a letter by the Australian Securities and Investments Commission (ASIC) dated 5 September 2019, which noted that ASIC encourages you to seek legal advice about pursuing any private rights that may be available to you.

Please note that this decision notice does **not** constitute legal advice to you about your private legal rights. The FOI Act provides you with a right of access to documents, and is not a mechanism for you to seek legal advice from, or legal research by, an agency.

You may wish to refer to publicly available documents concerning an individual's ability to institute proceedings, including section 13 of *the Crimes Act 1914* (Commonwealth) and subsection 10(2) of the *Director of Public Prosecutions Act 1983* (Commonwealth) ('the DPP Act'). In addition, subsection 9(5) of the DPP Act and the CDPP's annual reports, also publicly available, contain information on the Director's power to take over, carry on or discontinue prosecutions for Commonwealth offences that have been instituted by individuals.

A search was conducted of the records of the CDPP. No documents within the scope of your request were found. I am satisfied that no such documents exist. Your request is refused in accordance with paragraph 24A(1)(b)(ii) of the FOI Act which provides:

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) [...]
 - (ii) does not exist.

RIGHTS OF REVIEW

Under section 26 of the FOI Act I am required to inform you of your rights of review.

Section 54 of the FOI Act gives you the right to apply for an internal review of the decision refusing to grant access to documents. An application for internal review of the decision must be made in writing within 30 days of receipt of this letter. No particular form is required but it is desirable to set out in the application the grounds on which you consider that the decision should be reviewed. An application may be sent to foi@cdpp.gov.au or to the following postal address:

FOI Coordinator
Commonwealth DPP
PO Box 3104
CANBERRA ACT 2617

If the decision on internal review goes against you, you are entitled to seek a review of that decision by the Information Commissioner. Alternatively, you are entitled to bypass the internal review

process, and make an application directly with the Office of the Information Commissioner pursuant to section 54L of the FOI Act.

An application to the Information Commissioner may be made in writing and should be directed to the following address:

Information Commissioner (Reviews)
GPO Box 5218
Sydney NSW 2001

Yours faithfully

A handwritten signature in black ink, appearing to read 'K Duncan', is positioned above the typed name.

Kirstin Duncan
Senior Federal Prosecutor
International Assistance Specialist Agencies