



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Phillip Sweeney

By email: foi+request-6598-1f4e0175@righttoknow.org.au

17 August 2020

Dear Mr Sweeney

Freedom of Information Request No. FOI 161-2020

I refer to your request for access to documents made under the *Freedom of Information Act 1982 (FOI Act)* dated 14 August 2020 by which you requested access to documents in the possession of the Australian Securities and Investments Commission (**ASIC**).

Your request sought access to the follow:

'Superannuation funds or schemes that are not established by statute are established as "trusts".'

Since superannuation trusts are generally expected to operate for many decades an amending power {Power of Amendment} is generally reserved in the original Trust Deed to allow the provisions of the original Trust Deed to be amended from time to time.

Some superannuation Trust Deeds also include a schedule of "administrative rules" which may be subject to a different amending power which can sometimes cause confusion in a poorly drafted "Trust Deed and Rules" document as covered in the often-cited Authority "Thomas on Powers" by Geraint Thomas {Oxford Universit Press}.

Chapters in "Thomas on Powers" include:

8 "The Excessive Execution of a power"

9 "Fraud on a Power"

15 "Powers of Revocation"

16 "Powers of Amendment"

Understanding these powers is important when considering if allegations have been made that there may have been "changes to the Deeds that disadvantage the membership" - that is invalid purported amendments have been made to the original Trust Deed and/or "Rules".

For example, an amending Deed may look valid on its face, but might be impugned under the equitable doctrine of a "Fraud of a Power" if, for example, the amending

Deed purports to abrogate a substantive benefit to a beneficiary of the trust (fund) provided in the original Trust Deed.

The document I seek is a copy of the title page of any edition of "Thomas on Powers" in the possession of ASIC as of 14 August 2020 that would confirm whether ASIC has possession of such a widely cited Authority as well as which edition or editions ASIC has in its possession.

IMPORTANT: I am not seeking a copy of the whole book which is a publically available document. I am only seeking a copy of the title page.

Title pages by themselves are not a publically available document.'

I am the authorised decision-maker for the purposes of section 23 of the FOI Act and this letter gives notice of my decision.

Decision and reasons for decision

I have decided to refuse your request for access to the requested material on the basis that this material, being the title page of the book 'Thomas on Powers' published by Oxford University Press, is not a document of an agency as defined under s 4(1) of the FOI Act.

Section 11 of the FOI Act provides a person with a legally enforceable right to obtain access to a document of an agency, other than an exempt document. The definition of 'document' is defined in section 4(1) of the FOI Act to include:

(a) any of, or any part of any of, the following things:

(i) any paper or other material on which there is writing;

(ii) a map, plan, drawing or photograph;

(iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;

(v) any article on which information has been stored or recorded, either mechanically or electronically;

(vi) any other record of information; or

(b) any copy, reproduction or duplicate of such a thing; or

(c) any part of such a copy, reproduction or duplicate;

but does not include:

(d) *material maintained for reference purposes that is otherwise publicly available; or*

(e) *Cabinet notebooks.*

Section 4(1) states that '*material maintained for reference purposes that is otherwise publicly available*' is excluded from the definition of 'document'. You have requested access to the title page of 'Thomas on Powers' by Geraint Thomas. The title page of this book meets the definition of '*material maintained for reference purposes that is otherwise publicly available.*' I note that this book, including any part of the book, is reference material used by ASIC that is otherwise publicly available and as such you do not have a right to access this material under the FOI Act.

The right of access under s 11 only extends to a 'document of an agency'. As such, you do not have a right of access under the FOI Act to material maintained for reference purposes that is otherwise publicly available.

The Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (FOI Guidelines) relevantly explain that material maintained for reference purposes that is otherwise publicly available (such as library reference material) are not 'documents' by virtue of s 4(1).¹

In your request you argue that title pages are not publicly available documents. However, the title page of 'Thomas on Powers' is publicly available as part of that book. For example, a brief online search reveals that the title page is publicly available to view on two different websites.² It therefore constitutes *material maintained for reference purposes that is otherwise publicly available*.

For the above reasons, I am satisfied that the material requested falls outside the access provisions of the FOI Act pursuant to s 4(1).

Review rights

If 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 foidr@oaic.gov.au or by telephone on 1300 363 992.

¹ FOI Guidelines [2.32]

² See

https://books.google.com.au/books/about/Thomas_on_Powers.html?id=9ZSpEt_3dHgC&redir_esc=y
and <https://www.amazon.com.au/Thomas-Powers-Geraint-ebook/dp/B008VDVF7U>.

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.

If you have any queries or wish to discuss, please contact me on Jessica.Zhang@asic.gov.au.

Kind regards

Jessica Zhang

Freedom of Information Officer

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