



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 7, 120 Collins Street,
Melbourne VIC 3000

Mail address for Melbourne office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075
Fax: +61 1300 729 000

www.asic.gov.au

Phillip Sweeney

By email: [foi+request-11671-
fad9c27c@righttoknow.org.au](mailto:foi+request-11671-fad9c27c@righttoknow.org.au)

Our Reference: FOI 149-2024

12 August 2024

Dear Mr Sweeney

Freedom of Information Request No. 149-2024

Notice of Access Decision

I refer to your request dated 11 July 2024 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,

Lawyers for ASIC have written to ASIC whistleblower, John Adams, claiming that "ASIC is not Corrupt".

If this is the case, then ASIC would not have assisted a number of trustees in stealing superannuation death benefit entitlements from widows of fund members and grossly underpaying members of Defined Benefit superannuation fund by way of what might be termed a "Deed Substitution Fraud".

The Commonwealth Parliament identified a "loop hole" in the law that would allow such frauds against widows and sought to close this "loop hole" by enacting the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012 that required trustees of Employer-Sponsored Defined Benefit to make a copy of the original Trust Deed that constituted and established every Defined Benefit Fund that they administer available for download on the public section of their websites. Superannuation trusts, funds and schemes are legally identified by the original Trust Deed that constituted and established that trust (fund).

If an amending power had been reserved in the original Trust Deed then copies of all amending Deeds (and other authorised amending Instruments) had to be made available for download as well as confirmed in the Explanatory Memorandum.

A copy of the most recent actuarial report had to be provided as well.

This Act provided similar transparency as that provided by the Parliamentary Contributory Superannuation Fund (PCSS) which will provide a superannuation pension to the Prime Minister and the Leader of the Opposition and a survivorship pension to their widows.

None of these documents makes reference to the commercial agreement between the sponsoring- employer and the trustee which is a separate contract document.

A trustee of a Defined Benefit fund must pay superannuation benefits when they fall due based on the original Trust Deed and all legally valid Amending Deeds read as "one legal document".

There is only one "Trust Deed" and not a multiple of "Trust Deeds".

An example of a "Deed Substitution Fraud" " is as follows:

The original Trust Deed of a Defined Benefit fund that was established several decades ago provide a lump sum benefit of \$20,000 to a member for every year of service with the sponsoring employer.

Over the decades there were two amending Deeds executed in accordance with the conditions and restrictions of the amending power reserved in the original Trust Deed that increase the annual benefit factor from \$20,000 to \$22,000 and then to \$24,000.

The average period of service before retiring or being retired by the employer was 25 years and there were 1000 members of this Defined Benefit fund and so the amount held on trust in the fund is \$600 million.

Therefore a typical fund members would receive a lump sum benefit of \$600,000 on retirement.

The sponsoring employer is taken over and a new trustee is appointed.

The trustee drafts what appears to be a legal document (Deed) where the benefit factor is stated as \$18,000 for every year of service.

A typical member who now retires only receives \$450,000 instead of \$600,000.

The amount required to be held in the fund is now only \$450 million or some \$150 million less than before.

Members who complain are show a copy of the "Latest Version of the Trust Deed" which purports to provide a benefit of \$18,000 for every year of service.

Meanwhile, the white-collar criminals who were appointed as the new trustees have used "creative accounting" to transfer the surplus \$150 million in the members' fund to their own "investment company" which then transfers the \$150 million to the white-collar criminals and the "investment" is then written down to zero and blamed on "adverse investment market conditions".

If the fund members, their wives and widows can inspect the original Trust Deed and all amending Deeds by downloading them from the trustee's website which was the intention of the Commonwealth Parliament, the fund members (and their lawyers) can easily determine that the trustee has engaged in fraudulent conduct costing each fund member who retires \$150,000 in lawful benefits.

The fund members now are entitled to compensation as confirmed by a former Minister for Superannuation, the Hon Bill Shorten MP who stated in a Media Release dated 13 April 2011:

"Investors in Regulated Superannuation Funds deserve to be compensated by the Government when they lose their investments through fraud or other malfeasance by super fund trustees. I'm very pleased to be able to offer Trio investors this compensation," Mr Shorten said.

ASIC Deputy Chair, Sarah Court, in testimony before the Senate Economics Reference Committee that ASIC was placing a high priority on non-payment and delayed payments of death benefits by trustees of Regulated Superannuation Funds.

"Dodgy super funds are not above the law"

<https://www.youtube.com/watch?v=MnyRa0jjJjU>

"Labor is letting Big Super to break the law. It stinks."

<https://www.youtube.com/watch?v=BmOhf7qCfls&t=81s>

"Australia needs to get serious about corporate crime. How is the status quo OK?"

<https://www.youtube.com/watch?v=CoHVQLxleFQ>

Request for Documents pursuant the Freedom of Information Act 1982:

This FOI request is for copies of documents including emails from ASIC to Senators, Members of Parliament, Parliamentary Committees or The Treasury and replies related Section 29B of the Superannuation Industry (Supervision) Act 1993 {SIS Act } and related SIS Regulation 2.28 related to the reason ASIC has provided for granting "Relief" for over a decade to a number of trustees of employer-sponsored Defined Benefit superannuation funds.

The reason ASIC has given is as follows:

"ASIC first provided this relief by class order in 2014, and since then has extended the period of relief in successive instruments. This has been to facilitate Government consideration of industry feedback in relation to the operation of section 29QB to require potentially sensitive information in relation to the commercial terms negotiated with different employer sponsors."

"Relief" was provided for over a decade out to 30 June 2024.

The search period is from the date the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 was given royal assent on 03 Dec 2012 to the present.

Yours faithfully,

P.C. Sweeney"

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

Information considered:

In reaching my decision, I have considered the following:

- the FOI Act, in particular s 24A;
- the Australian Information Commissioner's FOI Guidelines issued under s 93A of the FOI Act (**FOI Guidelines**);
- the terms of your request; and
- the details of the searches conducted by ASIC staff.

Decision and reasons for the decision

Section 24A of the FOI Act

Section 24A of the FOI Act, provides:

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.

The FOI Guidelines relevantly provide:

Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- *the subject matter of the documents;*
- *the current and past file management systems and the practice of destruction or removal of documents;*
- *the record management systems in place;*
- *the individuals within an agency or minister's office who may be able to assist with the location of documents, and*
- *the age of the documents.¹*

Enquiries were made with ASIC's Escalated Matters & Government team and Superannuation team for documents in response to your request. Searches for correspondence/emails were conducted for "29B" and "2.28". The team has advised that no documents falling within the terms of your request were identified.

The Superannuation team has also provided the following further information. ASIC does not administer s 29B of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* – *Classes of RSE licences* – and has no relief power. While s 29B is a 'modifiable provision' for the purpose of the relief and modification

¹ FOI Guidelines [3.89].

powers in ss 328 and 332 of the SIS Act, the relevant regulator of Part 2A of the SIS Act is APRA – see ss 5(8) and 6 of the SIS Act. Further, regulation 2.28 was omitted from the Superannuation Industry (Supervision) Regulations 1994 (**SIS Regulations**) in 2002 by SR No 21 of 2002.

My decision is therefore to refuse your request for access to documents under section 24A of the FOI Act on the basis that all reasonable steps have been taken to find the document(s) that fall within the scope of your request. I am satisfied that the document(s) do not exist. I have therefore decided to refuse your request pursuant to section 24A(1)(b)(ii) of the FOI Act.

Further information

Section 29QB of the SIS Act and regulation 2.38 of the SIS Regulations appear to more appropriately address the concerns in your request. As such, you may wish to lodge a fresh request seeking documents in relation to these provisions. If you would like to lodge a new request please address your application to:

Senior Manager – Freedom of Information
GPO Box 9827
Melbourne VIC 3001

Or send to email address FOIrequest@asic.gov.au.

Review rights

In the event that 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 enquiries@oaic.gov.au or by telephone on 1300 363 992.

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 questions or wish to discuss, please contact me at krystal.fung@asic.gov.au.

Yours sincerely,

A handwritten signature in black ink that reads "krystal fung". The signature is written in a cursive, lowercase style.

Krystal Fung
(Authorised decision maker pursuant to subsection 23(1) of the FOI Act)
For the Australian Securities and Investments Commission