

## Hodder, Patrick (SEN)

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**From:** Information Access <Information.Access@ombudsman.gov.au>  
**Sent:** Tuesday, 12 June 2018 3:51 PM  
**To:** Committee, Corporations (SEN)  
**Subject:** Commonwealth Ombudsman - Freedom of Information Request FOI-2018-50082 [SEC=UNCLASSIFIED]  
**Attachments:** Email from Committee to Ombudsman - 12 February 2018.pdf; Email from Committee to Ombudsman - 11 April 2018.pdf; Letter from Committee to Ombudsman - 11 April 2018.pdf  
**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Good afternoon,

The Commonwealth Ombudsman has received a freedom of information (FOI) request from Mr Phillip Sweeney for access to copies of correspondence between our Office and the Parliamentary Joint Committee on Corporations and Financial Services.

A search of our records has located the attached documents which have originated from your office and fall within the scope of the request.

I would be grateful if you could examine the attached documents and comment on their possible release under FOI. If you consider the documents should be partially or fully exempted from release, please advise the section(s) of the FOI Act you consider apply. I would also be grateful if you could provide reasons for seeking an exemption, if that is the case.

To meet our statutory obligations, please provide your response by **COB 19 June 2018**.

Kind regards,

**Jessica Phillips**  
**Legal Officer**  
**Legal Team**  
**Commonwealth Ombudsman**  
p : 1300 362 072 | f : 02 6276 0123  
e : [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)



*The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.*

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**From:** Shirley Tong  
**To:** [Committee, Corporations \(SEN\)](#)  
**Subject:** Mr Phillip Sweeney - response to your letter of 11 April 2018 [SEC=UNCLASSIFIED]  
**Date:** Wednesday, 2 May 2018 9:08:34 AM  
**Attachments:** [image001.png](#)  
[1-05-2018\\_17-55-27.pdf](#)  
[1-05-2018\\_17-55-27\\_1.pdf](#)  
[1-05-2018\\_17-55-27\\_2.pdf](#)  
[Letter - PJC CFS - to Commonwealth Ombudsman re Sweeney - 2018.04.06.docx](#)

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Dear Committee

Please see the attached letter in response to your 11 April letter about Mr Phillip Sweeney. We have also attached copies of our decision letters sent to Mr Sweeney.

Kind regards

**Shirley Tong**

Director, Operations North  
COMMONWEALTH OMBUDSMAN  
p: 1300 362 072 | f: 02 6276 0123  
e: [ombudsman.north@ombudsman.gov.au](mailto:ombudsman.north@ombudsman.gov.au)  
w: [www.ombudsman.gov.au](http://www.ombudsman.gov.au)



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Our ref: 2018-400020

30 April 2018

Dr Patrick Hodder  
Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services

By email to: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Dr Hodder

Thank you for your correspondence dated 11 April 2018 in relation to Mr Philip Sweeney.

I acknowledge Mr Sweeney has consented to my Office providing the Committee with a copy of our findings and decision on his complaint about ASIC. I enclose a copy of our letter to Mr Sweeney dated 4 August 2011 and our review decision dated 19 December 2011.

I note in his email to the Committee dated 5 April 2018, Mr Sweeney regards our decision as invalid, because in his view, ASIC provided us with false and misleading information and acted beyond the scope of its power.

In response to our letter to him dated 4 August 2011, Mr Sweeney sent my Office numerous letters detailing his dissatisfaction with ASIC and our investigation. These correspondences included the arguments he raised in his email to the Committee dated 5 April 2018.


It is our view that any information ASIC provided to my Office fell within the scope of our request and section 8(2A) of the *Ombudsman Act 1976* allows agencies to provide us with any information they deem relevant to an investigation.

Yours sincerely

Michael Manthorpe PSM  
Commonwealth Ombudsman

Our ref: 2011-106224

4 August 2011

Mr Phillip Sweeney  


Dear Mr Sweeney

I am writing to let you know that I have finished investigating your complaint about ASIC.

On 9 April 2011 you wrote to us about a 'missing' Trust Deed and ASIC's involvement in your attempts to resolve the matter.

### **History of your complaint**

I understand that on 25 March 1985, you commenced employment at Carlton United Breweries (CUB). You told us that when you were employed, you were offered a "current year financial benefit and a defined benefit super scheme."

In early 2007 you received your superannuation benefits. However, I understand that the amount was significantly lower than the sum you expected to receive.

Over the past several years, you have been trying to access a copy of the relevant Trust Deed and Rules that was in force at the time you were employed (i.e. as at 25 March 1985). It appears you believe that the 'missing' Trust Deed can demonstrate that you have not actually received your correct superannuation entitlements.

You have sought the assistance of the Superannuation Complaints Tribunal, APRA and ASIC to force the Trustee to locate and provide you with a copy of the document, to no avail.

You also told us that you received certain documents from APRA under FOI law. One of the documents that was released to you is dated 24 June 2010, and is from Chief Executive of the Trustee to APRA, stating that Trustee is in possession of "all amendments to rules since 1913 and corresponding actuarial certifications from August 1985 are available for inspection." You told us that this document proves that the Trust Deed in question does exist.

You wrote to ASIC and asked it to use its powers under s 1017C of the *Corporations Act* "to force the Trustee to locate and provide a copy of Deed" in force at the time you were employed.



## **My investigation**

I decided to investigate your complaint and asked ASIC for relevant information.

I also asked ASIC to provide me with copies of its correspondence to you.

### ***The Trust Deed and calculation of your benefits***

ASIC advised us that you contacted it on 31 March 2009 and requested that it compel the Trustee to provide you with a copy of the Trust Deed that was in force on 25 March 1985.

You had supplied it with a copy of a letter of engagement with CUB dated 25 March 1985. However, this letter indicated that you were eligible to join the Fund after a qualifying period of six months. This meant you joined the Fund on or around 25 September 1985.

ASIC told us that it contacted the Trustee about your request. The Trustee advised ASIC that it was not able to locate a copy of the Deed that was in force on 25 March 1985.

However the Trustee did locate a copy of the Trust Deed dated 26 August 1986, which contained the rules of the Fund dated 19 August 1985. A copy of that Trust Deed has been provided to you.

The Trustee advised ASIC that the Deed dated 26 August 1986 (incorporating the rules of the Fund dated 19 August 1985) was relevant to your situation. This was because you did not join the Fund until six months after you commenced employment with CUB. In other words, the Deed in force as at 25 March 1985 did not apply to your situation.

ASIC advised us that it was satisfied that the Trustee had conducted reasonable searches and there was nothing to suggest misconduct by Trustee.

ASIC also gave us a copy of its letter to you dated 2 July 2010. This letter contains information about how your superannuation benefit was calculated.

I have enclosed a copy of that letter.

### ***Section 1017C of the Corporations Act***

In your correspondence to us you have set out your view of how ASIC should be administering its obligations under certain sections of the *Corporations Act*. Specifically, you believe that under s 1017C, you are entitled to copies of certain documents and that ASIC has the power to compel the Trustee to comply with this provision.

As stated earlier, the Trustee was not able to locate a copy of the Deed dated 25 March 1985 and ASIC is satisfied that it does not need to take further action.

Regardless, it is the Trustee's view that the Deed dated 25 March 1985 is not applicable to your superannuation entitlement as you did not join the Fund until some six months later.

ASIC advised us of its view that even if the document was located, s 1017C may not operate as you suggested. Firstly, the section only applies to 'a concerned person'<sup>1</sup> being a person who was a member of the Fund within the past 12 months. As you are not a current member of the Fund, it is arguable whether s 1017C would apply to you.

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<sup>1</sup> As defined in s 1017C(9)

Secondly, because the document in question does not appear to be relevant to your situation, (because you did not actually join the Fund until September 1985) there is a further question as to whether you reasonably require it to understand your superannuation entitlement.

### **Conclusion**

I have not been able to determine that there is anything unreasonable in ASIC's consideration of this matter. To my mind, ASIC contacted the Trustee to ascertain the status of the document in question; it sought an explanation of how your benefits were calculated; and gave proper regard to relevant facts.

I have also considered your belief that the Trustee gave conflicting information to APRA and ASIC regarding the existence (or otherwise) of the document. However, as the document does not apply in your case, I have determined it is not necessary to resolve this question. Consequently, I have decided to stop investigating your complaint at this point.


Please contact me if you have any questions about this letter. If I do not hear from you by 19 August 2011 I will close your complaint record. You can seek internal review of my decision to stop investigating this complaint. However you must do so within 3 months of today. Should you wish to do this, please let me know and I will send you the review form.

Yours sincerely

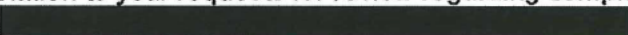
Ellisha Hill  
Senior Investigation Officer

Our ref: 2010-117854-R  
2011-106224-R  
2011-118730

19 December 2011

Mr Phillip Sweeney  


Dear Mr Sweeney

I am writing in relation to your requests for review regarding complaints investigated by our office about the  and the Australian Securities and Investments Commission (ASIC). My assessment is complete and I am now able to provide you with the following response. I apologise for the time taken by our office to reach this point and any inconvenience that this has caused.

Please note that a review conducted by this office is not a reinvestigation of your complaint. The matters that I consider as part of the review process are whether the processes followed by the Investigation Officers were fair and adequate and whether the conclusions that the Investigation Officers reached were reasonable and properly explained to you. In addition to my review, I have also examined all the further information you have provided to our office to determine whether there are any new matters that warrant investigation or further assessment.

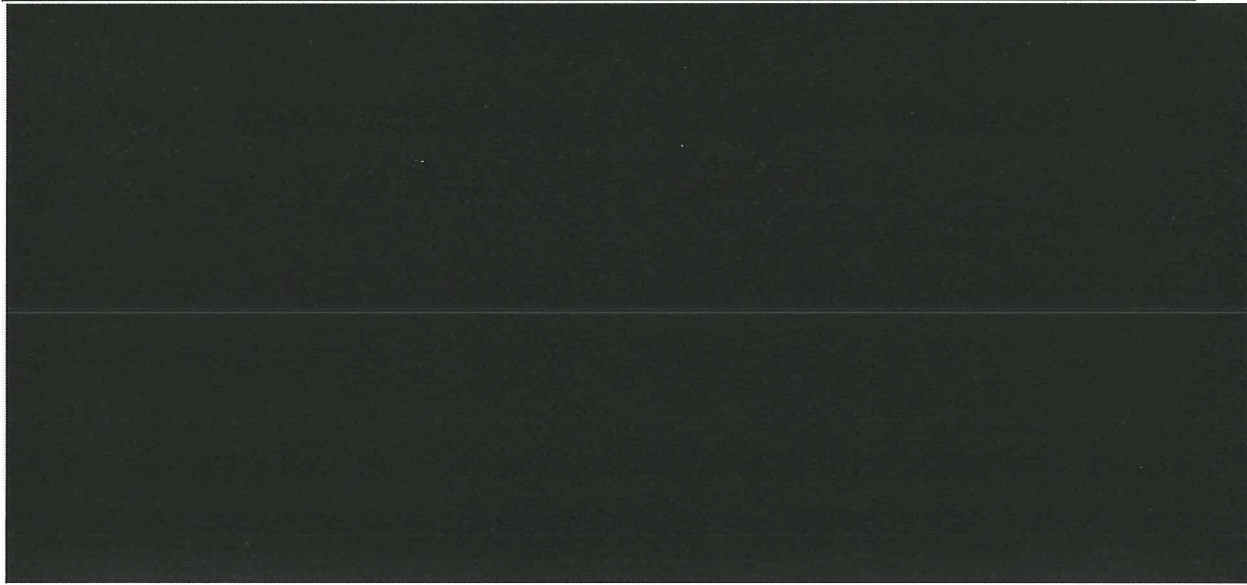
In assessing your requests for a review, I have considered all the documents on our files relating to your complaint, including the information you provided with your requests for review, your subsequent correspondence and in our recent telephone conversation.

After consideration of this information, I have made the following decisions.









**ASIC**

Your complaint about ASIC was allocated to Ms Hill for assessment. She initiated an investigation regarding your concerns about a 'missing' Trust Deed and ASIC's involvement in your attempts to resolve the matter.

On investigation, Ms Hill was unable to establish that ASIC had acted unreasonably in your case. Ms Hill confirmed that ASIC had contacted the Trustee to ascertain the status of the document in question and sought an explanation of how your benefits were calculated. Based on this information, Ms Hill could find no basis to be critical of ASIC.

Ms Hill advised that she also considered your advice that the Trustee gave conflicting advice to ASIC and APRA about the existence of the document in question. Ms Hill decided that as the document does not apply in your case, it was not necessary to resolve this question.

Ms Hill considered all of the information before her and decided to stop her investigation at that point.



You requested a review of Ms Hill's decision on the basis that you believe that you are a 'concerned person' as defined by s 1017C of the *Corporations Act 2001*, and as such are entitled to the information you requested from the Trustee. You also expressed concern at not being afforded natural justice through Ms Hill failing to allow you an opportunity to respond to the information provided to her from ASIC.

You then raised additional concerns about ASIC failing to provide our office with certain information in response to our requests. You reached this view after obtaining information via Freedom of Information (FOI) requests to our office. I have taken your concerns into account in my review of Ms Hill's decision. I have also considered the additional documents you have provided since Ms Hill's decision, in order to form a view on whether further investigation is required.

After consideration of all the information before me, I have decided to affirm Ms Hill's decision.

It is clear that you have been provided with the relevant Trust rules which were in effect at the time you joined the fund. I can appreciate that you believe you are entitled to further information and there is further action that ASIC could take, however I do not believe that further investigation by this office would shed more light on the matter or result in a better outcome for you.

#### **Further correspondence and new complaints**

As part of this review I have also examined all of your additional correspondence (excluding your complaints about the SCT or FOI requests). It is apparent that these raise some new issues. These include allegations about breaches of the Australian Public Service Code of Conduct by ASIC officers. Further, some of the issues you complain about are:

- the length of time taken before you were provided with information from the Trustee
- ASIC's attempts to confine the issues raised in your complaints
- ASIC failing to pursue your complaints about not being provided with information from the Trustee

On examination of the documents you provided in relation to these matters I have been unable to identify any issues which warrant our further action. Based on the information before me, I am satisfied that ASIC has taken appropriate steps to respond to the concerns which you have raised with it about the Trustee. I have also been unable to identify any potential code of conduct matters which would warrant further action from this office. Further, I do not believe that investigation by this office would provide you with the outcomes you seek and the best avenue through which you could pursue your claims about the Trustee would be through exploring legal options independently of our office.

#### **Conclusion**

To summarise, I have affirmed the decisions made by the Investigation Officers in these cases and further, our office does not intend to take action in relation to your subsequent correspondence about ASIC or APRA. I can appreciate that you may be disappointed with this outcome. Nevertheless, I hope you will see that I have given careful consideration to the concerns you have raised.

Consistent with our policy that we will review a decision only once, we will file but will not necessarily respond to any further correspondence we receive from you about these matters. We will be happy to assist you with any new and substantive issues that are within our jurisdiction and that are unrelated to this complaint.

Yours sincerely

David Pezzanite  
Review Officer

**From:** [Committee, Corporations \(SEN\)](#)  
**To:** [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)  
**Subject:** Findings and decision on ASIC's handling of Mr Sweeney's matter  
**Date:** Wednesday, 11 April 2018 3:32:00 PM  
**Attachments:** [Letter - PJC CFS - to Commonwealth Ombudsman re Sweeney - 2018.04.06.docx](#)

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Dear Mr Manthorpe,

Please see the attached letter from the Parliamentary Joint Committee on Corporations and Financial Services relating to ASIC's handling of Mr Sweeney's matter.

Kind regards,

Dee

Dee Oxley | Administrative Officer

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Parliamentary Joint Committee on Corporations and Financial Services  
Department of the Senate  
Phone 02 6277 3583 | Fax 02 6277 5719  
[www.aph.gov.au/senate](http://www.aph.gov.au/senate)



**PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES**

11 April 2018

Mr Michael Manthorpe  
Commonwealth Ombudsman  
[ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

Dear Mr Manthorpe,

**Findings and decision on ASIC's handling of Mr Sweeney's matter**

The Parliamentary Joint Committee on Corporations and Financial Services (the committee) has received complaints from Mr Phillip Sweeney about the handling of his matter by the Australian Securities and Investments Commission (ASIC).

The committee previously asked if you would provide it with a copy of any findings made by the Commonwealth Ombudsman in relation to ASIC's handling of Mr Sweeney's matter.

Thank you for your letter of 22 February 2018 with your offer to provide a copy of the Commonwealth Ombudsman's findings with Mr Sweeney's consent. Mr Sweeney has provided his consent in the attached email, along with some other views on the review conducted by the Commonwealth Ombudsman. The committee would therefore welcome receiving a copy of the Commonwealth Ombudsman's findings and decision on ASIC's handling of Mr Sweeney's matter, as well as any comments you may have regarding the other matters Mr Sweeney raised in his email regarding the review process.

In your letter of 22 February 2018, you referred to secrecy statutes in Section 35A of the *Ombudsman Act 1976*. For future reference, I note that such secrecy statutes do not impede the committee's powers to call for documents to be produced. However, committees are able to consider claims regarding public interest immunity as set out in Senate Procedural Order of Continuing Effect No. 10.

If you have any further queries regarding this correspondence, please contact the committee secretariat on (02) 6277 3583 or by email at [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Patrick Hodder'.

Dr Patrick Hodder  
**Committee Secretary**



**From:** Phillip Sweeney [mailto: ]  
**Sent:** Thursday, 5 April 2018 5:16 PM  
**To:** Committee, Corporations (SEN)  
**Subject:** Re: PJC on Corporations and Financial Services - notification of committee decision

Dear Patrick

I am happy to give my consent to the Committee to obtain a copy of the findings of the Commonwealth Ombudsman and by all means obtain a copy of the decision by the Commonwealth Ombudsman, however the decision of the Commonwealth Ombudsman is invalidated due to a contravention of **Section 13(9)** of the **Public Service Act 1999** since the ASIC Officer, [REDACTED], provides false and misleading information to the Commonwealth Ombudsman concerning the scope and operation of Section 1017C of the Corporations Act 2001 as I have detailed in previous correspondence to yourself.

That it there has been a '*fraud on the Commonwealth Ombudsman*' by an officer of ASIC just as there have been two '*frauds of the Tribunal*' (the Superannuation Complaints Tribunal) by two purported corporate trustees of this fund.

Please refer to the ruling of Hayne JJ and his fellow High Court justices in *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 at [52]:

The consequence is that the decision made by the Tribunal is properly regarded, in law, as no decision at all. This is because, in the sense of the authorities, the jurisdiction remains constructively unexercised. The authorities were collected in *Bhardwaj*[65].

[REDACTED] also acted ultra vires by making representations to the Commonwealth Ombudsman that were beyond the scope of ASIC's statutory remit pursuant the ASIC Act 2001 and the Corporations Act 2001.

[REDACTED] provided '*information*' that had not been requested by the Commonwealth Ombudsman and which in any event was beyond the statutory remit of the Commonwealth Ombudsman.

The questions asked by the Commonwealth Ombudsman were within the remit of the Commonwealth Ombudsman and the response by [REDACTED] should have been limited to answering the questions asked in an honest manner.

I was unable to advise the Commonwealth Ombudsman of the fraud on the Commonwealth Ombudsman at the time as I only obtained evidence of the fraud some time later under the Freedom of Information Act 1982.

I will be seeking a time exemption from the Federal Court of Australia to pursue the '**fraud on the Tribunal**' to have the ruling of the Tribunal based on a fraudulent "Trust Deed" declared invalid, as again I only discovered the fraud some time after the Tribunal made a decision by obtaining a copy of the fraudulent "Trust Deed" lodged with the Tribunal some time latter.

I shall provide you with details of the two frauds on the Tribunal to add to your file.

Regards

Phillip Sweeney

Subsection 13(9) of the Public Service Act 1999

(9) An [APS employee](#) must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's [APS employment](#).

A30614

22 February 2018

Dr Patrick Hodder  
Committee Secretary  
Parliamentary Joint Committee of Corporations  
and Financial Services  
Parliament House  
Canberra ACT 2600

By email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Dr Hodder

Thank you for your email of 12 February 2018 in which you indicate that Mr Sweeney has made complaints to the Parliamentary Joint Committee on Corporations and Financial Services about the Australian Securities and Investments Commission (ASIC).

In your email you request a copy of any findings made by this Office in relation to ASIC's handling of Mr Sweeney's matter.

The *Ombudsman Act 1976* prohibits me from releasing information unless I am satisfied that it is in the interests of a Department, prescribed authority or person, or it is otherwise in the public interest to do so.

I understand from your email that the Committee has already been told that Mr Sweeney had previously made a complaint to my Office. I can confirm that a complaint about ASIC was investigated by this Office in 2011. In the event you are able to provide me with Mr Sweeney's written consent, I would be happy to provide a copy of the final letter from my Office to Mr Sweeney.

Yours sincerely

Michael Manthorpe PSM  
Commonwealth Ombudsman

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**From:** Oxley, Dee (SEN) [[mailto:\[REDACTED\]](mailto:[REDACTED])] **On Behalf Of** Committee, Corporations (SEN)

**Sent:** Monday, 12 February 2018 9:07 AM

**To:** Ombudsman <[Ombudsman@ombudsman.gov.au](mailto:Ombudsman@ombudsman.gov.au)>

**Cc:** Committee, Corporations (SEN) <[Corporations.Joint@aph.gov.au](mailto:Corporations.Joint@aph.gov.au)>

**Subject:** PJC on Corporations and Financial Services - Information request



## **PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES**

12 February 2018

Mr Michael Manthorpe  
Commonwealth Ombudsman  
[ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

Dear Mr Manthorpe,

The Parliamentary Joint Committee on Corporations and Financial Services (the committee) has received complaints from Mr Phillip Sweeney about the handling of his matter by the Australian Securities and Investments Commission (ASIC).

The committee has asked if you would provide it with a copy of any findings made by the Commonwealth Ombudsman in relation to ASIC's handling of Mr Sweeney's matter.

If you have any further queries regarding this correspondence, please contact the committee secretariat on (02) 6277 3583 or by email at [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au).

Yours sincerely

Dr Patrick Hodder  
**Committee Secretary**

PO BOX 6100, PARLIAMENT HOUSE, CANBERRA, ACT, 2600  
Tel: (02) 6277 3583 Fax: (02) 6277 5719 Email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)  
Web: [www.aph.gov.au/joint\\_corporations](http://www.aph.gov.au/joint_corporations)