

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Inquiry into the Oversight of ASIC, the Takeovers Panel and the Corporations

Legislation No.1 of the 46th Parliament

2021 - 2022

Division: Financial System Division
Topic: CDDA Scheme
Reference: Written
Member: Julian Hill

Question:

1 –

a) On the assumption that Treasury's current position is correct – i.e. that ASIC cannot be authorised to consider claims under the CDDA scheme, and that the Treasurer is unable to determine claims against ASIC under the CDDA scheme – what are the implications for past payments made under the CDDA scheme by ASIC? Does it mean those payments were illegal or invalid?

2 – Section 12

a) Can Treasury confirm that its position is that section 12(3) of the Australian Securities and Investments Commission Act 2001 (ASIC Act) requires ASIC to act independently of the Treasurer's direction?

b) Can Treasury confirm that the relevant precursor to section 12(3) of the ASIC Act was section 12(3) of the Australian Securities Commission Act 1989 (ASC Act), and the sections are effectively in the same form?

c) Can Treasury confirm that the Explanatory Memorandum to the Australian Securities Commission Bill 1988 provided that, under clause 12, the Minister would be able to direct the ASC, for example, to have regard to any relevant policies of the Commonwealth Government?

d) Can Treasury explain that the Minister may direct ASIC to have regard relevant policies of the Commonwealth Government, and that the legislative history of section 12 of the ASIC Act supports the interpretation?

3 –

a) Does Treasury accept that the CDDA Scheme is a policy of the Commonwealth Government?

4 – CDDA & Prime trust

a) If the Treasurer may direct ASIC to regard the CDDA Scheme as a Commonwealth Government policy, on what basis can ASIC and Treasury claim that ASIC is acting contrary to section 12(3) by considering the Prime Trust CDDA claim? To date Treasury has just made a blanket claim without explaining the basis of its position which contradicts previous policy.

b) Prime Trust investors have received confirmation that the Treasurer can determine their claim from several parties including:

- ASIC (on numerous occasions)

- Commonwealth Ombudsman (on two occasions)
- Department of Finance (on several occasions)

Although it is usual practice for the relevant entity to pay CDDA Claims (if compensation is warranted), this is not a mandated requirement (as per RMG409, paragraph 81).

If the Treasurer were to determine the Prime Trust CDDA Claim, with any compensation payable provided from consolidated revenue, and there was no “direction” for ASIC to pay the claim, what relevance does s12 then have? Can you please explain in this scenario what is the actual basis for Treasury’s view that s12 remains a barrier?

5 –

Government Policy requires all government agencies to be accountable and liable if their actions cause detriment to third parties. RMG409 (paragraph 14) states that non corporate Commonwealth entities are subject to the CDDA Scheme, and various exemptions are noted (such as Commonwealth departments). There is no reference to any exemption for ASIC, and with RMG409 updated at least twice since 2015, there has been ample opportunity to denote any exemption for ASIC if indeed such an exemption existed.

- a) Can you point to any announcement by government or Treasury that ASIC is somehow exempt from the CDDA Scheme?
- b) Can you point to any debate in Parliament about exempting ASIC from the CDDA Scheme?
- c) Under section 12 of the ASIC Act, the Treasurer is able to direct ASIC in terms of policies and priorities. As the CDDA Scheme is a policy of the Government, and there has been no announcement that ASIC is exempt from the CDDA Scheme, what impediment is there to the Treasurer renewing the Authorisation to ASIC?
- d) On the assumption that Treasury’s newly conservative reading of the ASIC Act is correct (i.e. ASIC cannot be subject to the CDDA scheme), if Parliament wished to remedy this situation and make the CDDA scheme available to ASIC, what action would be needed? Can this be achieved by regulatory action, or would legislative change be required? What legislative action could be taken?

Answer:

In accordance with subsections 12(1) and (3) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the Minister may give ASIC a direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under the corporation’s legislation, insofar that the direction is not about a particular case. This power is substantially the same as the power in the equivalent provision of the predecessor legislation, the *Australian Securities Commission Act 1989*.

The Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) operates on the basis of authority provided to individual portfolio Ministers under the executive power of sections 61 and 64 of the Constitution. A portfolio Minister may authorise an officer in a portfolio non-corporate Commonwealth entity (NCE) to act as an agent of the Minister to consider CDDA Scheme applications made against that entity. The CDDA Scheme is an administrative policy and is wholly governed by Resource Management Guide 409 (RMG 409).

As stated in Treasury’s response to this Committee’s previous Questions on Notice (Additional Document No. 279 of Current Enquiry), the Treasury portfolio Minister cannot authorise an ASIC officer to determine and/or pay a CDDA Scheme claim made against ASIC as doing so would be inconsistent with the requirement in subsection 12(3) of the ASIC Act that the Minister must not direct ASIC ‘about a particular case’. Similarly, a decision by

an ASIC officer acting as agent of the Minister to pay a CDDA Scheme claim is considered to be a decision and direction of the Minister 'about a particular case' in contravention of subsection 12(3) of the ASIC Act.

Any change to the current arrangements involves a number of policy, legislative, regulatory, and administrative considerations and is a matter for Government. Further work would be required by Treasury and Finance to develop these options. The act of grace scheme is similar to the CDDA scheme, and is capable of considering ASIC related claims, including those relative to defective administration by ASIC.

ASIC has not advised Treasury of any intention to disturb the small number of relatively low value past payments made by ASIC under the CDDA Scheme.