

Department of Finance

Response to Question on Notice

PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Inquiry into Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament

Scheme for Compensation for Detriment caused by Defective Administration

Hearing of 16 November 2021

Question on Notice 1 (Proof Hansard page 3)

Mr Sebar: It is the general practice. When there is a change in minister or government where that previous minister has made an authorisation, the expectation is that the new minister, if they wish, if there an authorisation is in place, will remake it.

Mr HILL: My recollection is that the delegations continue, although out of a sort of custom-practice courtesy and that in the first few weeks of a new minister's term one of the things that would start to come up is re-establishing, validating or giving that minister an option to vary delegations but that, until there is a conscious variation, they remain in force. Is that a reasonable sort of layman's takeout?

Mr Sebar: I believe that's correct, although I'm not an expert on the remaking of delegations. That's certainly how we treat delegations relating to the act of grace power.

Ms Hall: We're happy to further clarify that point, on notice, if that would be of assistance.

Response

Sections 6-9 of *Resource Management Guide 409, Scheme for Compensation for Detriment caused by Defective Administration*¹ (RMG 409) sets out the basis for the Compensation for Detriment caused by Defective Administration (CDDA) scheme and the authorisation of officers to make decisions:

6. *The 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.*
7. *Portfolio ministers decide applications made under the CDDA Scheme. A portfolio minister may authorise an official in a portfolio entity to consider and decide applications made under the CDDA Scheme.*
8. *The minister's authority is to be conferred expressly and must be given separately from the minister's general authorisations to incur expenditure. This requirement is in recognition of the special and potentially sensitive nature of decisions made under the CDDA Scheme for which the entity and its minister may be held accountable.*

¹ <https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409>

9. *Where a decision-maker is a person other than a portfolio minister, the decision-maker acts for and on behalf of the relevant minister; that is, the decision-maker is an agent of the minister and not a delegate. Only the portfolio minister or authorised official can decide claims under the CDDA Scheme.*

AGS Legal Briefing No. 74 provides the following with regard to delegations and authorisations²:

“In some circumstances a person in whom a power is vested can authorise another person to exercise that power for and on his or her behalf. It is essential to note at the outset that a person exercising a power for and on behalf of another does so as the 'alter ego' of the person in whom the power is vested. That is, the act of the authorised person is, at law, the act of the person in whom the power is vested. This is fundamentally different to the act of a delegate which, at law, is the delegate's, and not the delegator's, act.”

“Delegations do not automatically cease to have effect merely because there is a change in the identity of the person who is the delegator. However, it is possible for the new holder of the power to expressly revoke or vary delegations given by the person who previously was the delegator.”

AGS Legal Briefing No. 74 (in the section titled “Change in person holding office”) notes that the law is unclear on whether an authorisation continues when an individual ceases office. Due to this lack of certainty, the Department of Finance advises agencies that a new authorisation should be made when there is a change of Minister. This ensures that any decision taken by an authorised agent is lawful.

² <https://www.ags.gov.au/publications/legal-briefing/br74.htm>