



**ASIC**  
Australian Securities &  
Investments Commission

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| <b>Committee</b>        | Parliamentary Joint Committee on Corporations and Financial Services                                |
| <b>Inquiry</b>          | Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament |
| <b>Question No.</b>     | 052 – 01-05   |
| <b>Date</b>             | 15 February 2022  |
| <b>Topic</b>            | CDDA Scheme   |
| <b>Reference</b>        | Written, 15 February 2022   |
| <b>Committee member</b> | Mr Julian Hill MP   |

#### **QoN052-01**

- 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?

#### **Answer**

ASIC is giving further consideration to whether there are any implications in relation to the relatively low value past payments it has made under the CDDA Scheme.

#### **QoN052-02**

- a) Can ASIC 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 ASIC 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 ASIC 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 ASIC 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?

#### **Answer**

ASIC refers to Treasury's response to the same Question on Notice and notes the following:

Section 12 of the ASIC Act

Subsection 12(3) of the ASIC Act provides that the Minister (which includes the Treasurer) must not give a direction to ASIC under subsection 12(1) about a particular case. ASIC refers to the following extract of section 12 of the ASIC Act:

**12 Directions by Minister**

*(1) The Minister may, by legislative instrument, 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 corporations legislation (other than the excluded provisions).*

*(2) The Minister must not give a direction under subsection (1) unless he or she has:*

*(a) notified ASIC in writing that he or she is considering giving the direction; and*

*(b) given the Chairperson an adequate opportunity to discuss with the Minister the need for the proposed direction.*

*(3) The Minister must not give a direction under subsection (1) about a particular case.*

*(4) ASIC must comply with a direction under subsection (1).*

**Section 12 of the ASC Act**

Section 12 of the *Australian Securities and Investments Commission Act 1989* (which was in force until the commencement of the ASIC Act):

*(1) The Minister may give the Commission a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under a national scheme law of this jurisdiction.*

*(2) The Minister shall not give a direction under subsection (1) unless he or she has:*

*(a) notified the Commission in writing that he or she is considering giving the direction; and*

*(b) given the Chairperson an adequate opportunity to discuss with the Minister the need for the proposed direction.*

*(3) The Minister shall not give a direction under subsection (1) about a particular case.*

*(4) The Commission shall comply with a direction under subsection (1).*

*(5) The Minister shall cause a copy of an instrument under subsection (1):*

*(a) to be published in the Gazette within 21 days after the instrument is made; and*

*(b) to be laid before each House of the Parliament within 15 sitting days of that House after the publication;*

*but failure of the Minister to do so does not affect the instrument's validity.*

**QoN052-03**

- a) **Does ASIC accept that the CDDA Scheme is a policy of the Commonwealth Government?**

**Answer**

ASIC's understanding is that 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. ASIC refers to the Department of Finance's guidance in *Resource Management Guide 409: Scheme for Compensation for Detriment caused by Defective Administration*.

**Qon052-04**

- 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?**

**Answer**

ASIC considers that this is a matter for Treasury and refers to Treasury's response this Question on Notice.

**Qon052-05**

**At the time of submitting the Prime Trust CDDA Claim in February 2019, the ASIC website stated that both the Treasurer and ASIC were able to determine CDDA Claims. On 12 March 2019, a few weeks after the Prime Trust CDDA Claim was lodged, several senior lawyers from ASIC's Chief Legal Office (CLO) discussed the content of ASIC's website and**

- removed the reference to ASIC being able to determine CDDA Claims and
- confirmed that the Treasurer has the power to determine CDDA Claims

and agreed to publish this information on the ASIC website. Since March 2019, the ASIC website has continuously stated, and indeed continues to state, that the Treasurer has the power to determine CDDA Claims.

a) Is the refusal / failure of the Treasurer to determine the Prime Trust CDDA Claim inconsistent with the advice that was published by ASIC on its website?

b) Have Prime Trust investors, who relied upon the ASIC website, been denied procedural fairness?

#### **Answer**

Since March 2019, ASIC's website has stated that:

#### ***Financial compensation schemes***

*The Act of Grace mechanism under section 65 of the Public Governance, Performance and Accountability Act 2013 applies to ASIC and is administered by the Department of Finance. The mechanism is a discretionary power to allow payments to be made if the Finance Minister or their delegate considers there are special circumstances and it is appropriate. Further information about the Act of Grace mechanism is available on the Department of Finance's website.*

*The Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) permits individuals to apply for compensation from non-corporate Commonwealth entities (NCCEs) in certain circumstances. However, while ASIC is an NCCCE, it is unable to consider applications made to it under the CDDA Scheme. This is because only Portfolio Ministers and officials authorised by the Portfolio Minister can decide applications made under the CDDA Scheme. ASIC has not been authorised to decide applications under the CDDA Scheme since September 2015.*

*The Department of Finance's website explains the CDDA Scheme in further detail.*

Treasury and ASIC's approach to the Prime Trust CDDA claim has been consistent with this guidance and ASIC does not consider that investors have been denied procedural fairness.