

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Oversight of ASIC, the Takeovers Panel and the Corporations Legislation

No.1 of the 46th Parliament

2021 - 2022

Agency: Department of the Treasury
Topic: The Scheme for Compensation for Detriment caused by Defective Administration (CDDA)
Reference: Spoken (16 November 2021)
MP: Mr Julian Hill

Questions:

1. Can each agency take on notice to provide advice as to all CDDA payments that have been made by ASIC since 1995 and who the decision-maker was. (page 8)
2. We know that there's an act of grace payment assessment process underway. ASIC has provided input into that, as I presume Treasury has? (page 10)
3. Can you explain to the committee, now or on notice, how that advice was communicated to ASIC? Was it verbal? Was it written? What advice was provided to the Treasurer of the day regarding ASIC's clear request for authorisation to be renewed under the CDDA scheme? (page 11)
4. Since that interaction between ASIC and Treasury in 2016 about the authorisation, has there been any further consideration given to that matter at all, or is that where it rested? (page 12)
5. Could you take on notice and please explain the basis for the position that was reached. If you can write it out in words—you'll be able to find the brief, you can paraphrase it and try and explain to the committee why the Treasury is saying that ASIC can no longer be authorised to make determinations under the CDDA scheme, when they had for years before that and had been happily making them—or probably unhappily, given the nature of the decisions. (page 13)

Answer:

1. Treasury notes that ASIC is best placed to respond to the question about CDDA payments made by ASIC since 1995.
2. In response to an Act of Grace claim being handled by the Department of Finance, the Treasury has provided information to the Department of Finance in relation to the act of grace application. This is consistent with the normal practice and, as a procedural fairness requirement, the applicant was provided an opportunity to respond to the information the Treasury has provided.
3. Treasury advised ASIC by email in March 2016 that Treasury considered ASIC was not able to be authorised under the CDDA Scheme.

4. Treasury has considered on a number of occasions whether the CDDA scheme could apply to ASIC and has not changed its position that ASIC was not able to be authorised under the CDDA scheme.

5. ASIC is one of only three Commonwealth entities that has body corporate status and is also a non-corporate Commonwealth entity. As the CDDA Scheme applies to non-corporate Commonwealth entities it would apply to ASIC, unless that is inconsistent with a provision in the ASIC Act. Treasury's position is that the application of the CDDA Scheme is inconsistent with section 12(3) of the ASIC Act, which defines the Minister's powers of direction. For this reason, Treasury considers that the Minister cannot direct ASIC to make a CDDA payment in a particular case and the Minister cannot personally authorise an ASIC officer, as the Minister's agent, to make a CDDA decision.

In addition, the Act of Grace process provides an effective mechanism for deciding compensation claims. The Act of Grace process offers effectively the same discretionary outcome as the CDDA Scheme. Under both mechanisms, an application is considered on its merits, afforded procedural fairness (including the provision of reasons for the decision) and is subject to review. In addition, unlike a CDDA Scheme decision, an Act of Grace decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.