



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Roger Pratt and Steve O'Reilly

By email to: grosvenormgmt@bigpond.com

13 March 2020

Dear Mr Pratt and Mr O'Reilly

**APPLICATION OF THE SCHEME FOR COMPENSATION FOR DETRIMENT CAUSED BY
DEFECTIVE ADMINISTRATION (CDDA SCHEME) TO ASIC**

I refer to your letters of 10 December 2019, 28 January, 30 January and 7 February 2020.

I understand your correspondence is about ASIC's handling of an application made by the SR Group on 26 February 2019 under the scheme for compensation for detriment caused by defective administration (**CDDA Scheme**) on behalf of unitholders in the Prime Retirement and Aged Care Property Trust (**the Application**).

Status of the Application

On 28 February 2019, ASIC received the Application dated 21 February 2019.

On 7 March 2019, ASIC advised the SR Group that ASIC is no longer authorised to consider applications made under the CDDA Scheme.

On 15 March 2019, ASIC was asked to provide submissions in response to a claim made under the act of grace payments mechanism by the SR Group to the Department of Finance (**Act of Grace Application**). The SR Group relied on the contents of the Application to make this claim.

In July 2019, ASIC was advised by the Department of Finance (**Department**) that the Act of Grace Application was finalised on the basis that SR Group had failed to provide details of the individuals which the SR Group purported to make the Act of Grace Application on behalf of, or proof of authority to act on those individuals' behalf.

I understand that on 28 January 2020, you were advised by the Department that it is open to you to make a fresh act of grace payment application. ASIC was copied into this correspondence with you.

ASIC's handling of the Application

In substance, you contend that although ASIC is no longer authorised by its Responsible Minister, the Treasurer, to be the decision-maker for applications made under the CDDA Scheme (**Authorised**), ASIC is obliged to consider the Application in accordance with ASIC's 'Guide to Assessing Claims for Compensation under the CDDA Scheme' dated June 2013 (**ASIC CDDA Scheme Guidance**) and guidance published by the Department of Finance (**Department**) titled, 'Resource Management Guide 409: Scheme for Compensation for Detriment caused by Defective Administration' (**RMG 409**).

By reference to the ASIC CDDA Scheme Guidance and RMG 409, you state the following:

- ASIC still has a role to *"examine the claim, collect relevant documentation and information...to formulate recommendations for consideration by the decision maker...In this situation, the Treasurer"*;
- the Application has been incorrectly diverted for consideration under the act of grace payment mechanism in reliance on *"flawed interpretations of legislation and the outlined processes for the CDDA scheme"* in circumstances where the claim that ASIC has engaged in defective administration is fundamental to the Application; and
- the Applicants have not been afforded procedural fairness by ASIC and the Department.

Furthermore, in your correspondence dated 30 January 2020 you note that:

- it has been previously confirmed to you that ASIC is subject to the CDDA Scheme; and
- ASIC's website confirms that the Treasurer has the power to make decisions in relation to claims made under the CDDA Scheme against ASIC.

You request that the Application be dealt with under the CDDA Scheme in accordance with the ASIC CDDA Scheme Guidance and RMG 409.

Application of CDDA Scheme to ASIC

I refer to paragraphs 6 to 11 of RMG 409 which provides background to the operation of the CDDA Scheme:

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.*
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.*
10. *A finding of no defective administration can only be reached by an authorised decision-maker.*
11. *Where a portfolio minister has responsibility over multiple entities, an authorisation will generally need to be provided by the relevant portfolio minister to a relevant official in each entity.*

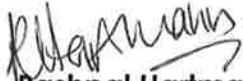
As stated above, on 7 March 2019, ASIC advised the SR Group that ASIC is no longer authorised to consider applications made under the CDDA Scheme. I note from your letter of 10 December 2019, you have also received advice from the office of the Assistant Treasurer and the Assistant Minister for Superannuation, Financial Services and Financial Technology that ASIC and APRA's ability to consider matters under the CDDA Scheme has been "removed".

ASIC is a body corporate (s8 of the ASIC Act) and is only deemed a non-corporate entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*. Furthermore, the CDDA Scheme is an administrative scheme and is not supported by legislation.

ASIC does not accept your proposition that in the absence of an Authorisation, ASIC is obliged to "examine the claim, collect relevant documentation and information...to formulate recommendations for consideration by the decision maker...In this situation, the Treasurer". There is no requirement or authority for ASIC to apply the CDDA Scheme.

In the circumstances, ASIC will not be treating the Application as a claim against it under the CDDA. However, as stated above, it remains open to you to submit an act of grace payment application to the Department in relation to the matter as the act of grace payments mechanism.

Yours sincerely



Rashpal Hartmann

Commission Counsel

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