PRIME TRUST ACTION GROUP

10 December 2019

Ms Adriana Bianchi
Complaints Officer / Chief Legal Office
Australian Securities and Investments Commission

By email: adriana.bianchi@asic.gov.au

Dear Ms Bianchi

PRIME RETIREMENT AND AGED CARE PROPERTY TRUST

The co-authors of this letter, Steve O'Reilly and Roger Pratt, are principals of the Prime Trust Action Group (PTAG). PTAG was established in late 2010 to provide support and information to unit holders in the Prime Retirement and Aged Care Property Trust (Prime). The responsible entity for Prime, Australian Property Custodian Holdings Limited (APCHL) had then appointed Administrators, following the appointment of Receivers and Managers by three secured creditors, and the Prime unit holders stood to lose a significant proportion of, if not all of their investment.

The interests of more than six thousand Prime unit holders are represented by PTAG

For over a year prior to the appointment of the Administrators to APCHL we had been separately corresponding with ASIC in relation to a number of issues, where we believed APCHL had breached its obligations to the Prime unit holders, urging that ASIC take action to protect their rights. Subsequent litigation pursued by ASIC, the Liquidators and Receivers and Managers found that there had been serious breaches of trust by APCHL and our concerns had significant merit.

Since the appointment of Administrators (subsequently Liquidators) to APCHL, PTAG has liaised with and provided information to both ASIC and the Liquidators in support of their actions. PTAG continues to support the Liquidator in its approach to the Court to obtain orders supporting that unit holders should be treated as unsecured creditors in the winding up of APCHL and Prime.

Unfortunately, all these efforts have not to date and are unlikely to result in any significant return to Prime unit holders.

Given the longevity and extent of our involvement we believe that we are qualified to comment on the issues outlined below.

Eighteen months ago, we were approached by SR Group who were making submissions to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to provide information on Prime, which would be provided as a case study for the Commission. We also discussed the possibility of making an application under the Compensation for Detriment arising from Defective Administration, CDDA, scheme. With support from and information provided by PTAG, SR Group lodged such an application on 26 February 2019.

It is now more than nine months since this application was submitted, during which time we have become increasingly concerned at the manner in which it has been handled. It is our view that there has been a failure to properly consider the application in accordance with the procedures outlined in

the Guide to Assessing Claims for Compensation under the CDDA Scheme, issued by ASIC in June 2013, which is consistent with the process outlined in Resource Management Guide No. 409 – Scheme for Compensation for Detriment caused by Defective Administration issued by the Department of Finance in May 2017. Both these documents are currently and freely available through their departmental public websites.

After ASIC acknowledged receipt of the application, there have been two separate reasons cited for not having this matter dealt with under the CDDA scheme; rather having it treated as an Act of Grace exercise.

NO AUTHORISATION TO APPOINT DECISION-MAKERS

In April 2019, the Department of Finance contacted SR Group by email advising that it was addressing all CDDA applications in respect of ASIC under the Act of Grace mechanism, with the explanation that an earlier authorisation provided by the Responsible Minister, the Treasurer, had expired in September 2015 and not been subsequently renewed. Accordingly, ASIC was not in a position to consider any CDDA applications.

Resource Management Guide No, 409 states:

> *(paragraph 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.*
>
> *(paragraph 8) The minister's authority must 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 responsible.*
>
> *(paragraph 9) Where a decision-maker is a person other than the responsible minister, the decision-maker acts for and on behalf of the responsible minister, that is, the decision-maker is an agent of the minister and not a delegate. Only the portfolio minister or an authorised official can decide claims under the CDDA scheme.*
>
> *(paragraph 10) A finding of no defective administration can only be reached by an authorised decision-maker.*

The lack of any authorisation by the portfolio minister to appoint an official within ASIC to consider and decide CDDA applications has no influence on whether ASIC is unable or should not process the CDDA application made by SR Group on behalf of Prime unit holders.

The Guide to Assessing Claims for Compensation under the CDDA Scheme issued by ASIC makes it clear that it is not deciding the propriety of any claims made in any CDDA application. In the absence of any authorisation for an official within ASIC to act as a decision-maker, its role is to examine the claim, collect relevant documentation and information in accordance with the guidelines to formulate recommendations for consideration by the decision-maker who will make the decision. In this situation, the Treasurer.

Further, in the absence of any authorisation, the only person able to make a finding of no defective administration is the Treasurer.

REMOVAL OF ASIC'S AND APRA'S ABILITY TO CONSIDER CDDA COMPLAINTS

In recent weeks there were discussions between SR Group, the office of the Assistant Treasurer and the Assistant Minister for Superannuation, Financial Services and Financial Technology, following which SR Group were advised that in 2015 a decision was made to remove ASIC's and APRA's ability to consider CDDA complaints.

As an initial observation we refer again to Resource Management Guide 409. This states in its initial paragraph that it is a discretionary mechanism available to non-corporate Commonwealth entities. It is our understanding that ASIC is a non-corporate Commonwealth entity, which we understand has been confirmed in emails to SR Group by both ASIC and the Department of Finance. Further there is no reference at all in the guide noting the removal of ASIC's ability to consider CDDA complaints despite the version of the Guide being dated May 2017, which conflicts with the date of the decision in the advice provided to SR Group.

SR Group were further referred to section 12 of the ASIC Act in relation to the 2015 decision. In particular:

> *(section 12.1) The Minister may give ASIC a written 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.*
>
> *(section 12.3) The Minister must not give a direction under subsection (1) about a particular case.*
>
> *(section 9 of the Corporation Act) defines "corporations legislation" as the ASIC Act, the Corporations Act and particular rules of court.*

The CDDA scheme arrangements are not a function of the ASIC Act or the Corporations Act; rather its basis of authority is provided under sections 61 and 64 of the Constitution (refer paragraph 6 of Resource Management Guide 409). Accordingly, section 12 should not and does not preclude ASIC considering the CDDA application submitted by SR Group; to formulate recommendations for the Treasurer to form an opinion and decide whether to authorise a discretionary payment to parties who may have suffered detriment as a result of ASIC's defective administration or decide whether there has been no defective administration.

We are extremely concerned that the issues raised, which have been promulgated on flawed interpretations of legislation and the outlined processes for the CDDA scheme, are designed to divert the matter to be dealt with as a matter under the Act of Grace arrangements. Referring the matter under the Act of Grace arrangements would not consider an issue of defective administration or allow one to be considered in the future. We believe that the issue of defective administration is fundamental to the CDDA claim submitted by SR Group.

It is our view that the conduct presented by ASIC and the Department of Finance, in this matter, conflicts with a requirement for the matter to be afforded procedural fairness.

Resource Management Guide 409 provides that:

> *(paragraph 39) Each request under the CDDA Scheme must be determined on its own merits.*
>
> *(paragraph 40) Prior to a decision being made on an application, the entity must ensure that the claimant is afforded procedural fairness. This includes, but is not limited to:*
>
> - *providing an opportunity for the claimant to present their claims or allegations in writing*

- *providing an opportunity for the claimant to view and comment on all relevant information, material and/or documents that will be considered by the decision-maker*
- *making a decision that is free from bias.*

Accordingly, we believe that it is in the best interests of all parties for the CDDA application submitted by SR Group to be dealt with in accordance with the processes and procedures in the documents outlined in this letter without any further delay.

Yours faithfully,

Roger Pratt Steve O'Reilly

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