

Haydar Tuncer

From: Rashpal Hartmann
Sent: Wednesday, 1 September 2021 2:58 PM
To: Chris Savundra
Cc: Kevin Truong
Subject: RE: thank you [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]

Chris

Please see below an email from Kevin, he reviewed Hansard and started identifying the further information we need to provide.

Regards

Rashpal Hartmann

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Sent: Wednesday, 1 September 2021 2:20 PM
To: Rashpal Hartmann s 22 >
Subject: FW: thank you [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]

Rashpal

I've reviewed the Hansard and there are a number of questions for us to address highlighted in yellow. I'll consider these further.

Mr HILL:...

I'll turn to another matter, which was the subject of a media report over the weekend relating to the Prime Retirement and Aged Care Property Trust. It seems a bit strange, but the investors seem to be in what I'd describe as a catch 22. They're seeking \$200 million in compensation from ASIC under a scheme that I just learnt about through the article and just researched, which compensates people for bad decisions by regulators. It's called the CDDA scheme, the Scheme for Compensation for Detriment caused by Defective Administration. Catchy! It relates to the collapse of that trust. It was a \$550 million collapse in 2010. The full Federal Court, in 2019, banned Bill Lewski, the director, for 25 years, I think, and also the former Howard government minister Michael Wooldridge was banned for two years for being a company director, and both of them got fined. Whoops! Not to trivialise in any way the harm that was done. The media reports left me bemused because there seems to be a bit of a Mexican stand-off or a chicken-and-egg situation. The investors are pursuing a claim for \$200 million, and there's expert speculation, which reported:

... the claim would be unlikely to succeed because the bar for defective administration is high – investors would need to show Asic had a legal obligation not to give APCH a licence.

I accept that that's a separate issue; I'm not going to the merits of the claim. But ASIC have said they lost jurisdiction to determine this in 2015. The Treasurer has said he couldn't possibly get involved because it would interfere with ASIC's independence. So I'm left none the wiser. The investors simply want a decision. Could you perhaps shed some light on this? It was a very strange and long article to read.

Mr Longo : It's an excellent question with a lot of history behind it. I will try to answer, then I'll ask Chris Savundra to help me, because there are some legal aspects to it that I think will fill the picture out. You mentioned September 2015. Until then, the so-called act-of-grace payments—we could make those ourselves; we made that decision ourselves. Since then, the decision whether to make an act-of-grace payment is now for the minister, and we get consulted depending on the circumstances as to whether the minister will make that decision or not. But the government and Treasurer would really be in the best position now to answer the question as to the status of that particular application. But I'll just ask Chris Savundra to—

Mr HILL: In handing over to Chris, can I just seek clarification on the term that you used? The media article in the digging that I've done suggests that Treasury or others are trying to steer people towards the so-called act-of-grace payments, which are the ones that, ultimately, are at the discretion of the government. Usually the finance minister has to sign them off. The investors don't want an act-of-grace payment. They want a determination under this specific scheme. I was under the understanding that this scheme still exists. So I just pulled that up because you've used the words 'act of grace', but that's not what they're pursuing. The media reports were that, for whatever reason, at some point in 2015 ASIC lost the delegation, which they had from the then Assistant Treasurer Josh Frydenberg when he was in his previous role. They had a delegation to make a determination under the CDDA Scheme and for some reason that delegation was lost. Why was the delegation lost? I understood that delegations from ministers to agencies were standing delegations. They can be refreshed or revoked when there's a change of minister but they don't lapse. Why was the delegation lost? Does the scheme still exist? Who can determine things under that scheme? I'd like to understand that before we talk about act of grace payments, if that's okay, Chair.

CHAIR: Of course.

Mr Savundra : You're correct in that the defective administration, or the CDDA, scheme, remains in place. As I understand, in September 2015 the authorisation for the minister lapsed. I'd like to take on notice just to double check what I'm about to tell you is correct, but as I understood it, it was a personal authorisation. It was when the then acting minister ceased to be the acting minister that the authorisation lapsed. In terms of the chronology of events, if it might assist you, it lapsed in 2015. In February 2019 ASIC received a CDDA application on behalf of 40 investors relating to the client trust. In March 2019 we advised those applicants that we no longer had an authorisation and, therefore, we were unable to consider the application under the CDDA Scheme. I think, as Mr Longo has said, the authorisation was a matter for the minister. So really that's as far as ASIC can take it.

Mr HILL: I have two supplementary questions, Chair. If you could give us quite a specific answer. Perhaps I'm just arcane and curious, but I would like to understand the delegation issue precisely. I have an email that ASIC sent to a complainant in March 2019 saying very clearly that the authorisation lapsed when there was a change of office holders. I'd like to unpick that a little more. Have there been any discussions or dialogue between ASIC and the Treasury or the Treasurer since receiving the request in 2019? What advice or request for advice has come from the Treasury and the Treasurer's office? What advice has been provided by ASIC in relation to this matter? Have there been discussions with any other ministers or the Department of Finance? I see in the email in 2019 that ASIC referred the complainants to the Department of Finance, not the Treasury. I'm sorry. I'm not trying to be tricky. It says, 'You may wish to contact the Discretionary Payments Section of the Department of Finance,' with an email address.

Mr Savundra : I'd need to take that on notice in terms of the interactions that we've had with Treasury in relation to this specific application—that's the Prime Trust investors' application. More generally from

time to time over that period since September 2005 there have been a number of interactions with Treasury in relation to the CDDA Scheme and the fact that there is no authorisation for ASIC.

Mr HILL: Has ASIC, at any point, sought a reauthorisation to make determinations under that scheme?

Mr Savundra : I'm not sure whether we've explicitly sought it, but we've certainly raised the question. I want to ensure that I don't encroach into any privileged communications around LPP. I think questions around that are better addressed by Treasury.

Mr HILL: Would ASIC see benefits in restoring the prior arrangements where you were able to administer that scheme? Have any concerns been raised by government or Treasury regarding ASIC's administration of that scheme when you had it? Final question: in terms of the current CDDA scheme—wherever it sits is still somewhat mysterious; is it Finance or is it Treasury?—does ASIC get engaged when such determinations are being considered or made under that scheme? Do you get consulted? Do you provide advice? Do you provide recommendations to a decision-maker that might sit elsewhere. Do you still have any role? That is what I'm trying to get to?

Mr Savundra : In relation to the last part of that question, was that in relation to act of grace or under the CDDA scheme?

Mr HILL: Both.

Mr Savundra : Just in terms of concerns, I'm not aware of any concerns having been raised around ASIC's handling of CDDA claims which resulted in the authorisation lapsing—so no concerns, as far as I'm aware. It's ultimately a matter for government but, given Treasury's response, which was reported in the paper, I think ASIC stands ready, willing and able to deal with the CDDA applications if an authorisation is so granted. But obviously that's a matter for the minister.

In terms of engagement with ASIC, I would anticipate that, in relation to CDDA, we would be asked to make submissions in relation to the underlying merits of the application. Certainly in relation to act-of-grace applications, we are consulted extensively. The Department of Finance appoints a relevant delegate, who is the decision-maker. We get given the claim or the allegations and then we're given the opportunity to make submissions to the Department of Finance and then the delegate makes a decision.

Mr HILL: Thank you; that's very helpful. My final question on that topic is: have you been asked for any input on an act of grace or a CDDA claim assessment in relation to the Prime property trust collapse?

Mr Savundra : I'd like to take that on notice, Mr Hill. I'm not aware of any. If the report in the paper is correct around Treasury's position, I wouldn't have thought that they would, given that they don't feel that they're in a position to make a determination.

Mr HILL: The stated reason was that they didn't want to interfere with ASIC's independence, which I think, left the readers, or me at least, to throw my hands up in the air and going, 'Really? Someone's got to be responsible!' If you don't have the delegation, it makes no logical sense to say that the Treasury wouldn't assess it because it would interfere with your independence. But, anyway, we will take that up with Treasury.

Kevin Truong

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From: Chris Savundra <s 22>
Sent: Friday, 27 August 2021 2:21 PM
To: Kevin Truong <s 22>; Rashpal Hartmann <s 22>
Subject: FW: thank you [SEC=OFFICIAL]

Hi Keven and Rashpal,

Please see attached. Many thanks for your assistance with preparation for the PJC hearing. Much appreciated.

I took a fair few questions on notice by the CDDA which we'll need to get to the bottom of (hopefully we know or will be able to ascertain the answers easily). Thanks again.

Kind regards,

Chris Savundra
General Counsel

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From: Joseph Longo <s 22>
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Cc: Commissioners <s 22>; Louise Macaulay <s 22>; Warren Day <s 22>; Greg Kirk <s 22>; Chris Savundra <s 22>; Bruce Meagher <s 22>; Greg Kirk <s 22>
Subject: thank you [SEC=OFFICIAL]

Just a note to thank you all for your 24/7 efforts trying to ensure all the Commissioners were as prepared as we could be for what turned out to be another challenging PJC appearance. Your efforts are much appreciated. Could you please forward this email to whoever else should be acknowledged and copy me in...

Have a good weekend.

Regards,

Joe

Joseph Longo
Chair

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ASIC

FOI 251-2021

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