

Prime Trust Action Group

primetrustactiongroup@gmail.com

2 February 2023

Committee Secretary
Economics Reference Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via Email: economics.sen@aph.gov.au

Dear Committee Members

INQUIRY INTO ASIC - PUBLIC SUBMISSION BY PRIME TRUST ACTION GROUP

Firstly, thank you for the opportunity to make a Submission in relation to your current inquiry into ASIC.

We are pleased to attach our Submission, and consent to the publishing of this Submission at the Committee's discretion.

We would be happy to elaborate on any aspect of this Submission and/or appear before the Committee as required.

Yours sincerely

Steve O'Reilly
Principal, Prime Trust Action Group
primetrustactiongroup@gmail.com

— Roger Pratt
Principal, Prime Trust Action Group
primetrustactiongroup@gmail.com

PUBLIC SUBMISSION TO ERC's ASIC INQUIRY BY PRIME TRUST ACTION GROUP ("PTAG")

This submission addresses the following sub-categories of the Terms of Reference ("**ToR**") for this ASIC Inquiry relating to "*The capacity and capability of the Australian Securities and Investments Commission to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct ...*":

- (c) whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement;
- (i) any other related matters.

These submissions arise from the following circumstances:

- ASIC's apparent failure to investigate reports of misconduct and defective administration by its own officers; and
- the denial of procedural fairness to investors as a result of ASIC's refusal to consider a claim submitted by investors in good faith under the Compensation for Detriment due to Defective Administration Scheme ("**CDDA Scheme**").

It is submitted in particular that ASIC's refusal to consider the investors' claim under the CDDA Scheme – where it has no basis to refuse to do so – clearly does not meet the expectations of government, business and the community with respect to regulatory action and enforcement.

ASIC's unilateral decision to consider itself excluded from the CDDA Scheme is a policy failure and administrative black-hole that must be urgently addressed.

Prime Trust Action Group ("PTAG")

This Submission is made by PTAG, which represents the interests of around 6,500 investors in the failed Prime Retirement & Aged Care Property Trust ("**Prime Trust**"), which collapsed resulting in investor losses of more than \$500m.

Compensation for Detriment due to Defective Administration Scheme ("CDDA Scheme**")**

The CDDA Scheme was established in 1995 and applies to all non-corporate Commonwealth entities. ASIC is considered to be a non-corporate Commonwealth entity for the purposes of the CDDA Scheme.¹

Under the CDDA Scheme, parties who have suffered damage due to the actions or inactions of a Commonwealth entity are eligible to submit a claim against that entity and receive compensation if warranted.

The Department of Finance ("**DoF**") is responsible for setting government policy in relation to the CDDA Scheme, which is detailed in Resource Management Guide No. 409 ²("**RMG 409**"), as issued and regularly updated by DoF. It is important to note that RMG 409, which was updated as recently as 17 November 2022, and all previous versions of RMG 409, do not contain any exemption for ASIC under the CDDA Scheme.

The Commonwealth Ombudsman Fact Sheet entitled "*Compensation for Defective Administration*" ³ confirms that ASIC is indeed subject to the CDDA Scheme:

"The CDDA scheme applies to all non-corporate Commonwealth entities under the Public Governance, Performance and Accountability Act 2013, with the exception of the departments of the Commonwealth Parliament".

Importantly, the CDDA Scheme contains a number of accountability measures that are not applicable to other compensation schemes such as the "*Act of Grace*" Scheme, including but not limited to the following:

- CDDA claims can only be rejected based on publicly defensible reasons (refer RMG 409, section 18);

¹ Refer ASIC Act s8(1A)

² Available at: <https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409>

³ Available at: https://www.ombudsman.gov.au/data/assets/pdf_file/0026/35594/Compensation-for-defective-administration.pdf

- the CDDA Scheme allows entities to “provide compensation where there is a moral rather than a legal obligation to do so” (refer “Commonwealth Ombudsman Fact Sheet”, paragraph 1);
- an entity determining a CDDA Claim “must act reasonably and according to principles of good decision making” (refer “Commonwealth Ombudsman Fact Sheet”, paragraph 5); and
- the entity determining a CDDA Claim “must ensure that the claimant is afforded procedural fairness” and decisions must be “free from bias” (refer RMG 409, section 39).

Prime Trust Claim Against ASIC Under the CDDA Scheme (“CDDA Claim”)

In February 2019, a group of approximately 1,800 Prime Trust investors lodged a CDDA Claim against ASIC seeking compensation of \$200m. The Claim alleges, in great detail and with full supporting documentation, that ASIC committed defective administration in failing to properly enforce the licencing requirements of the Corporations Act, which directly led to investor losses.

Prior to submitting the CDDA Claim, investors obtained confirmation from the following three sources that ASIC was subject to the CDDA Scheme:

- (1) On 13 March 2018, DoF provided written confirmation that ASIC was covered by the CDDA Scheme and that claims could be lodged direct to ASIC (refer Attachment 1);
- (2) On 23 January 2019, investors downloaded and noted that the ASIC website confirmed ASIC’s participation in the CDDA Scheme:

“Defective administration

Where there’s no legal right to compensation, we’ll consider whether we can compensate you under the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme). You need to show all of the following:

- *our administration was defective*
- *you suffered a loss or detriment as a result, and*
- *we could reasonably have expected you would suffer the loss or detriment as a result”;* and

- (3) On 14 February 2019, a Senior Manager within ASIC’s Chief Legal Office provided PTAG with a copy of ASIC’s “Guide to Assessing Claims for Compensation Under the CDDA Scheme” dated June 2013, again confirming that ASIC was able to consider and determine applications under the Scheme (refer Attachments 2 and 3).

It is important to note that prior to the lodgement of the CDDA Claim, no advice was provided by ASIC, DoF or any other party, that ASIC was no longer authorised to consider and determine claims submitted under the CDDA Scheme.

ASIC’s Approach After Submission of the CDDA Claim

Notwithstanding the assurances given by DoF and ASIC prior to the lodgement of the CDDA Claim, ASIC has, since 2019, refused to process the CDDA Claim, unequivocally stating that it is no longer authorised to determine such claims. As a result, the CDDA Claim has remained in limbo for the last four years having neither been approved nor rejected.

Examples of the unequivocal statements made by ASIC that ASIC is not authorised to determine claims under the CDDA Scheme are provided below (please note that source documents are available upon request and any bold text below denotes emphasis added):

In March 2019, the ASIC website ⁴ was changed to state, and continues to state to this day, as follows:

*“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 NCCE, 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.**”*

⁴ Available at: <https://asic.gov.au/about-asic/dealing-with-asic/financial-compensation-schemes/>

On 7 March 2019, a representative from ASIC's Chief Legal Office, stated that:

"While the CDDA scheme permits individuals to apply for compensation from non-corporate Commonwealth entities, ASIC has not been authorised by the Minister to consider applications made under the CDDA scheme. ASIC is therefore unable to consider any application made under the CDDA scheme."

On 8 March 2019, a representative from ASIC's Chief Legal Office, stated that:

"Up until September 2015, ASIC officials were authorised by the then Assistant Treasurer, Josh Frydenberg to make decisions and approve payments under the CDDA scheme. However, this authorisation lapsed when there was a change in the holder of the office of the Assistant Treasurer. Despite ASIC's status as a non-corporate Commonwealth entity under the Public Governance, Performance and Accountability Act 2013, ASIC is therefore unable to consider applications made to it under the CDDA scheme as it is no longer authorised by its Minister."

On 12 March 2019, a Senior Lawyer from ASIC's Chief Legal Office, stated that:

"Just to note that ASIC has not been authorised to decide applications under the CDDA Scheme since September 2015 .."

On 9 July 2019, one of ASIC's Executive Directors, stated that:

"I can confirm that ASIC has not had an authorisation to make a decision under the CDDA Scheme since 2016. As such, we are not able to progress any claims lodge with us pursuant to that Scheme."

On 9 July 2019, one of ASIC's Executive Directors, stated that:

"My understanding is that the CDDA Scheme is still in place. It is just that ASIC is not authorised to make any decisions in relation to the scheme."

On 13 March 2020, ASIC's Commission Counsel stated, in a letter to PTAG, as follows:

".. ASIC is no longer authorised to consider applications made under the CDDA Scheme"

In response to a Question on Notice from the Parliamentary Joint Committee on Corporations and Financial Services on 27 August 2021, ASIC stated as follows:

"We .. confirm that:

- Up until September 2015, ASIC officials were authorised by the then Assistant Treasurer to make decisions and approve payments under the CDDA Scheme. ASIC officials were provided a personal authorisation by the Assistant Treasurer;*
- This personal authorisation lapsed when there was a change in the holder of the office of the Assistant Treasurer. ASIC is, therefore, unable to consider applications made to it under the CDDA Scheme;"*

On 19 October 2021, a Senior Lawyer from ASIC stated as follows, in a letter to PTAG:

"ASIC has not been authorised to decide applications under the CDDA Scheme since September 2015."

It is extraordinary to note that, for several years prior to 2019, ASIC was promoting the position that it could determine CDDA claims, and it was only after the submission of the (large) CDDA Claim in February 2019, that ASIC suddenly claimed that its authorisation lapsed several years earlier in 2015.

Authorisation Provided to ASIC to Determine CDDA Claims ("Authorisation")

On 17 March 2015, Mr Josh Frydenberg, the then Assistant Treasurer, authorised various officials within ASIC to determine CDDA Claims (refer Attachment 4).

Importantly:

- the above Authorisation has never been revoked;
- there has never been any public announcement or advice that ASIC's administrative actions can no longer be considered under the CDDA Scheme;

- ASIC continues to maintain on its website that, while it is no longer authorised to consider CDDA Scheme applications, the Treasurer is authorised to determine such claims, thereby suggesting that ASIC remains covered by the CDDA Scheme.

In September 2015, when Mr Frydenberg was replaced as Assistant Treasurer, there was no new Authorisation issued by his replacement Ms O'Dwyer, nor was there any revocation of the Authorisation provided by Mr Frydenberg.

AGS Legal position

The Australian Government Solicitor ("**AGS**"), as the Commonwealth's legal adviser, has considered the issue as to whether, in the absence of a revocation, an authorisation continues in force after the person providing the authorisation leaves office.

In both:

- AGS Legal Briefing No. 74 dated 14 December 2004, entitled "*Delegations, Authorisations and the Carltona Principle*" (refer Attachment 5, page 10) which applied at the time that the CDDA Claim was submitted; and
- the updated version of AGS Legal Briefing No. 74 dated 16 June 2022⁵

it is clearly stated that authorisations may continue in-force after the party providing the authorisation leaves office.

Both AGS Legal Briefing No. 74 and the updated version state as follows:

"In Mochkin, the Full Court concluded that, at least in the context of authorisations under the Income Tax Assessment Act 1936, a change in the holder of the power did not result in authorisations given by that person ceasing to operate. In other words, authorisations given from one official to another survived even when the person who gave the authorisation leaves their office or position."

It is submitted that there is an obvious and persuasive similarity between *Mochkin* and ASIC's Authorisation, given that:

- *Mochkin* relates to an authorisation provided to persons within the Australian Taxation Office holding the office of Senior Officer Grade B to exercise the Minister's discretion to cancel or amend a person's reported income; and
- the terms of ASIC's Authorisation authorises any person holding the office of Chief Executive, Chief Financial Officer, Chief of Operations, or Financial Controller, to "*make decisions and approve payments under the CDDA Scheme*" on behalf of the Assistant Treasurer.

The AGS view about authorisations, has been referenced, acknowledged and supported by DoF, as the party responsible for overall CDDA Scheme Policy. In responding to Question on Notice 271 (from the Parliamentary Joint Committee on Corporations and Financial Services) dated 2 December 2021, DoF confirmed as follows (refer Attachment 6):

*"AGS Legal Briefing No. 74 (in the section titled "Change in person holding office") notes that the **law is unclear on whether an authorisation continues when an individual ceases office**"(emphasis added)*

It is appropriate for ASIC to consider legal advice when reviewing its position in relation to a CDDA Scheme application. The AGS, as the Commonwealth's legal adviser, is an appropriate independent source. However, by ignoring the uncertainty expressed by the AGS in its Legal Briefing, ASIC has set a dangerous precedent and contradicted the requirements set out in RMG 409 that applicants must be afforded procedural fairness and receive decisions which are free from bias.

It is also noted that, even after the DoF position re the status of ASIC's Authorisation was published in December 2021, and the updated AGS Legal Briefing was published in June 2022, there has been no attempt by ASIC to rectify the conflicting and unequivocal statements previously provided to PTAG, or to commence the processing of the CDDA Claim.

⁵ Available at: <https://www.ags.gov.au/publications/legal-briefing/lb-20220616>

Current Impasse

The current situation is completely unacceptable, with conflicting statements about the application of the CDDA Scheme to ASIC being made by ASIC, DoF, Treasury, AGS and the Commonwealth Ombudsman.

ASIC claims that it is not authorised to determine the CDDA Claim, a statement that is not supported by the AGS Legal Briefings or DoF's written position. It was therefore clearly not open for ASIC to unequivocally (and repeatedly) claim that its Authorisation lapsed in 2015.

On its website, ASIC claims that the Treasurer can instead determine CDDA Claims made against ASIC. However, Treasury claims that the Treasurer cannot intervene in such cases due to independence concerns, a claim that is contradicted by:

- the information continuously presented on the ASIC website over at least the last four years;
- ASIC's Authorisation dated 17 March 2015 which states that the Assistant Treasurer has "*responsibility for making decisions and approving payments*" under the CDDA Scheme; and
- information promoted by DoF's RMG 409 and the Commonwealth Ombudsman Fact Sheet.

ASIC continues to promote the position and maintain that it is covered under the CDDA Scheme, and therefore accountable under that Scheme. However, in practice, ASIC is exempt from the CDDA Scheme, as claims against ASIC alleging defective administration are currently not being processed (despite such claims against ASIC having been duly processed prior to 2015).

Meanwhile, DoF's RMG 409 and the Commonwealth Ombudsman continue to promote the position that ASIC is covered by the CDDA Scheme.

Despite having lodged the CDDA Claim four years ago, investors, many of whom are elderly and vulnerable, continue to await the determination of their Claim, and continue to believe that they are entitled to pursue a CDDA Claim. Investors believe that justice delayed is justice denied, that they have been denied procedural fairness and that there are no valid grounds for ASIC to continue to resist the processing of their CDDA Claim.

Accountability

One of the fundamental requirements of good government and governance is the need for Commonwealth entities to be accountable. The CDDA Scheme was introduced in 1995 and intended to apply to all non-corporate Commonwealth entities including ASIC.

However, since 2015, ASIC has, without proper public disclosure, effectively removed itself from the CDDA Scheme and currently enjoys the uniquely preferential position of not being accountable for its actions. It is submitted that this is an entirely unacceptable situation.

Investors can have no confidence whatsoever in a regulator if that regulator is not responsible for its actions and allowed to escape accountability. Government, business and community expectations that all regulators must be accountable are clearly not being met in the case of ASIC.

Remedy Sought

The remedy sought by this Submission is for:

- ASIC to be restored to, or confirmed as a participant of, the CDDA Scheme as a matter of urgency;
- the determination of all outstanding CDDA claims against ASIC to be expedited;
- a parliamentary investigation be undertaken into ASIC's handling of CDDA claims in recent years.

Steve O'Reilly
Principal, PTAG

Roger Pratt
Principal, PTAG

Dated: 2 February 2023