



Australian Government
Department of Finance

MINUTE

Nathan Rudder

A/g Assistant Secretary, Significant Matters Taskforce, Procurement & Insurance Division

Act of Grace Requests – ^{s22} [REDACTED] **and**
^{s22} [REDACTED]

Due Date: Friday 1 October 2021

Recommendations:

That you:

- i. **agree** to decline six (6) act of grace payments, totalling \$2,627,303.42, requested by a cohort of investors in two companies, ^{s22} [REDACTED] and ^{s22} [REDACTED] (**the Companies**) under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)*,

AGREED / NOT AGREED

- ii. **sign** 6 statements of reasons explaining your decision, and the reasons for it (**Attachment A**).

SIGNED / AMENDMENTS REQUIRED

- iii. **note** that the Department of Finance (**Finance**) has given consideration to the financial information, facts and claims of each investor in the 6 statements of reasons.

NOTED / PLEASE DISCUSS

Nathan Rudder

A/g Assistant Secretary
Significant Matters Taskforce
1 October 2021

Key Issues:

On 12 October 2020, Finance received 6 requests, totalling \$2,627,303.42, from ^{s22} [REDACTED] on behalf of 6 investors in the Companies.

- a. These requests broadly relate to alleged action, or omissions, by the Australian Securities Investments Commission (**ASIC**) in its role supervising financial institutions.

2. In making your decision, you need to consider the full contents of the Finance files that relates to the 6 requests, including but not limited to the following documents:

- a. §22's act of grace request on behalf of 6 failed investors, dated 28 September 2020, together with the attached supporting materials, including individual impact statements.
- b. Statements from the Department of Treasury (Treasury), received by Finance on 17 July 2020, 15 July 2021 and 28 July 2021.
- c. Submissions from ASIC, with attached supporting materials, received by Finance on 7 December 2020, 4 March 2021, 18 March 2021 and 26 May 2021.
- d. §22's responses to the Treasury's statements dated 22 July 2021 and 27 August 2021.
- e. §22's response to ASIC's submissions, dated 3 February 2021 and 22 April 2021.

§22 Claims

3. In summary, §22 claim that:

- a. ASIC was defective in the performance of its regulatory duties, which led to losses for investors in the failed companies.
- b. §22 make a large number of arguments in support of this claim, including that ASIC failed to:
 - i. Prevent the former Director from operating without a financial services license.
 - ii. Prevent the Companies from carrying out financial services and Managed Investment Schemes (MIS) without appropriate licences and registration.
 - iii. Prevent significant losses for investors.
 - iv. Take sufficient enforcement action.
- c. ASIC's failure to regulate the former Director, allowed these companies to operate without External Dispute Resolution (EDR) scheme membership. As such, investors are not able to seek redress elsewhere and the act of grace mechanism is a remedy of last resort.
- d. The ongoing financial hardship and personal impact on former investors is unfair and inequitable.

§22's full submissions are available at [Attachment B](#). All 6 individual impact statements are available at [Attachment C](#).

Agency Claims

4. In summary, Treasury and ASIC claim that:

- f. Private investments are ultimately a matter for individuals. It is not the Commonwealth's role to guarantee the safety of investments.
- g. While the Commonwealth has broad powers to act, it is not legally obliged to take regulatory action. It is unable to act on every report. It operates with discretion.
- h. §47E(d)
- i. §47E(d)

- j. All action, including investigations, were undertaken in accordance with Commonwealth policy. Further options for regulatory action are now limited due to the death of the Director and external administration of the Companies.
- k. In relation to compensation, the Government has considered the outcomes of the Financial Services Royal Commission, and has decided what policy settings are appropriate. No further compensation will be made.

l. §47E(d)

Treasury's statement, and ASIC's full submissions, are available at [Attachment D and Attachment E](#).

Reasons:

5. On balance, it is recommended that you decline these 6 requests.
6. Finance does not consider that there are special circumstances associated with these requests, including for, but not limited to, the following reasons:
 - a. It is a matter for individual members (i.e. not the Commonwealth) to make appropriate judgments and take responsibility for their own investment decisions.
 - b. While unfortunate, the circumstances of the former investors have not arisen as a result of the Commonwealth, nor are they 'special'.
 - c. Instead, based on evidence provided, the actions of the Companies and former Director was a key cause of investor losses (and not the actions of ASIC).
 - d. The Commonwealth has other support mechanisms available to assist individuals experiencing financial hardship.

A comprehensive statement of reasons explaining your decision to each of the 6 investors, and the detailed reasons for it, is at [Attachment A](#). In addition to these arguments, there may be additional reasons for declining these requests.

Background:

7. Finance has received a large number of act of grace requests from §22 relating to 11 failed investment schemes, including the Companies. §22 is an advocacy group, which provides services to businesses and individuals experiencing financial distress and individuals impacted by financial impropriety.

8. The total amount sought across the various claim groups is circa \$273.6 million. §47E(d)

[REDACTED] Further requests from similar claim groups may be received in future.

9. For each claim group, §22 has provided Individual Impact Statements, articulating the individual impact and financial losses for each member. Each of these statements have been provided to you and the claims considered on their merits. The individual impacts have been reflected in the 6 statements of reasons.

Act of Grace Process

10. Section 65 of the PGPA Act provides that the Finance Minister, or their authorised delegate, may authorise an act of grace payment where it is considered appropriate to do so due to special circumstances. You are a delegate for this purpose (Accountable Authority Instructions refer).

11. *Resource Management Guide No. 401 – Requests for discretionary financial assistance under the PGPA Act 2013 (RMG 401)* provides guidance on situations where an act of grace payment may be appropriate for a delegate to approve.

12. Some of the relevant considerations, which have been addressed in detail in the reasons, include whether:

- a. An act of a non-corporate Commonwealth entity (NCE) has caused an unintended and inequitable result.
- b. Commonwealth legislation or policy has had an unacceptable impact.
- c. The Commonwealth intends to introduce legislation or policy to cover this matter, and it would be desirable to apply the benefits of this prospectively.

CDDA Scheme

13. ASIC may not be able to consider claims of defective administration under the *Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)* due to a conflict in its enabling legislation.

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15. Notwithstanding this, whether the Minister, or an ASIC delegate, can, or cannot, consider a CDDA Scheme request because of portfolio enabling legislation is ultimately considered a matter for Treasury and ASIC as the responsible entities (and not Finance as policy owners of the CDDA Scheme). Furthermore, as there is no legal impediment to Finance considering these requests under the act of grace mechanism, Finance has proceeded on this basis.

Consultation:

16. Treasury, ASIC and the Australia Taxation Office (ATO) were consulted in relation to this matter:

- a. Treasury provided a broad statement to Finance covering all of the s22 claim groups.
- b. ASIC provided submissions specific to the two companies without commenting individually on the IIS. For completeness, ASIC was provided with all individual impact statements for consideration.
- c. The ATO provided a statement responding to specific questions posed by Finance.
- d. Both Treasury and ASIC were provided with the opportunity to fact check relevant extracts of the draft material facts and reasons for accuracy.

- e. This request is considered outside the remit of APRA. No specific superannuation related claims have been raised and there were no claims alleging that APRA caused or contributed to the losses suffered by the investor. As such, APRA was not consulted in relation to the two companies.

17. s42

[REDACTED]

s22

A/g Director
Discretionary Payments Section
Significant Matters Taskforce
1 October 2021