



Australian Government
Department of Finance

MINUTE

Gareth Sebar

Assistant Secretary, Procurement and Discretionary Payments Branch, Procurement & Insurance Division

Act of Grace Request – s22

Due Date: Friday, 30 September, 2022

Recommendations:

That you:

- i. **agree** to decline 217 act of grace payments totalling \$75,031,035.52, requested by a cohort of investors that were members of the s22 managed by s22 as the responsible entity, under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

AGREED / NOT AGREED

- ii. **sign** 217 statements of reasons (with individual impact statements) explaining your decision, and the reasons for it (**Attachment A**).

SIGNED / AMENDMENTS REQUIRED

Gareth Sebar
Assistant Secretary
Procurement and Discretionary Payments Branch
September 2022

Key Issues:

Between 18 March 2020 and 2 July 2020, Finance received act of grace requests, submitted by s22 seeking payments totalling \$75,031,035.52, on behalf of 217 investors (Applicants) that were members of the s22 managed by s22 as the responsible entity.

- a) §22 members suffered losses as unitholders in a diversified range of investments managed by the §22 including mortgage lending businesses, accommodation facilities in Australia and New Zealand and travel services.
 - b) These act of grace requests relate to the purported lack of regulatory oversight by the Australian Securities and Investments Commission (ASIC) in respect of the management of the §22 by §22
2. In making your decision, you need to consider the full contents of the Finance file that relate to the 217 requests, including but not limited to the following documents:
- a) §22's act of grace request on behalf of 217 §22 members, dated between 25 February 2020 and 25 May 2020, together with attached supporting materials (§22 Submissions).
 - b) Submissions from ASIC, with attached supporting materials, received by Finance on 1 June 2021, 12 July 2021 and 28 April 2022 (ASIC Submissions).
 - c) A statement from the Department of Treasury (Treasury), received by Finance on 14 July 2020 (Treasury Statement), and email of 26 July 2022 (Treasury email).
 - d) §22 response to the Treasury Statement, dated 11 August 2020.
 - e) §22 response dated 18 June 2021 to the ASIC Submission of 1 June 2021.
 - f) §22 supplementary correspondence, dated 31 March 2022.

§22 Claims

3. In summary, §22 claim that an act of grace payment is appropriate, on the basis of:
- a) ASIC's inaction, which could have prevented or minimised the §22 members' loss;
 - b) the circumstances of this matter constitute special circumstances;
 - c) Commonwealth legislation and policy has had an unintended, anomalous, inequitable and unacceptable impact on the Applicants; and
 - d) compassionate grounds,
 - i. without an act of grace payment, §22 unitholders who have suffered as a result of the actions of the responsible entities, will continue to suffer without their funds.

§22's full submissions are available at [Attachment B](#).

Agency Claims

4. In summary, ASIC and/or Treasury claim that:
- a) While the Commonwealth has powers to act, it is not obliged to take regulatory action.
 - b) §47E(d)
 - c) 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.

In particular, ASIC claims that:

- a) §47E(d) [REDACTED]
- b) §47E(d) [REDACTED]
- c) §47E(d) [REDACTED]

ASIC's full submissions are available at [Attachment C](#). The Treasury Statement and Treasury email are available at [Attachment D](#).

5. On balance, it is recommended that you decline the 217 requests.

6. Finance does not consider that there are special circumstances associated with these requests, including but not limited to the following reasons:

- a) The fundamental causes of the Applicants' losses are the actions of the §22 responsible entities, and not the actions of the Commonwealth;
- b) There is no unintended outcome from the decision by the Commonwealth not to introduce a compensation scheme that would cover §22 investors that would give rise to special circumstances, especially in light of a policy decision not to provide access to a Commonwealth funded compensation scheme to §22 investors;
- c) It is a matter for individual investors (i.e. not the Commonwealth) to make appropriate judgments and take personal responsibility for their own superannuation and investment decisions.
- d) §22 have not provided any evidence of a direct causal link between investor losses and any action, or omission, by the Commonwealth;
- e) §22 members' claims do not justify overriding a clear policy intention not to provide access to Commonwealth funded compensation where §22 members suffered loss, even where fraud existed; and
- f) There are alternate means of financial support provided by the Commonwealth, which may be available to the §22 members if they are facing financial insecurity and/or ill health.

7. A comprehensive statement of reasons explaining your decision to each of the 217 Applicants, and the detailed reasons for it is at [Attachment A](#). In addition to these arguments there may be further reasons for declining these requests.

Background:

8. Since February 2020, Finance has received over 970 act of grace requests from §22 relating to thirteen (13) failed investment schemes. The total amount sought across the various claim groups is approximately \$398.2 million. §22 provides advocacy services to businesses and individuals experiencing financial distress and individuals impacted by financial impropriety. §22 operates under a fee for service model with the aim of securing compensation for their clients.

9. Finance has declined act of grace payments for three groups of claimants represented by §22, for a total of 129 requests to date (§22). §22 sought internal review of the decisions relating to two of the failed investment schemes (§22), both of

which were declined. The consultation process has recently been completed for requests relating to the remaining ten schemes. For each claim group, §22 [REDACTED] has provided individual impact statements for most of the members, articulating the individual impact and financial losses. These statements have been provided to you and considered on their merits. The individual impacts have been addressed in the 217 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. §22 [REDACTED]'s application was originally prepared for ASIC under the *Scheme for Compensation for Detriment caused by Defective Administration* (CDDA Scheme). ASIC has advised §22 [REDACTED] that it is unable to consider claims of defective administration under the CDDA Scheme due to the interactions of the CDDA Scheme and its establishing legislation.

14. There is no legal impediment to Finance considering these requests under the act of grace mechanism.

Consultation:

15. Treasury and ASIC were consulted in relation to this matter. In response:

- a) ASIC provided three submissions in response to the §22 [REDACTED] submissions.
- b) Treasury provided the Treasury Statement, a broad statement to Finance covering all claim groups, and subsequent Treasury email clarifying the status of the proposed Compensation Scheme of Last Resort.
- c) Treasury and ASIC were provided with two opportunities to fact check relevant extracts of drafts of the statement of reasons for accuracy.

16. §42 [REDACTED]

s42



s22



s22



Director
Claims Support Section
Procurement and Discretionary Payments Branch
19 September 2022