



Australian Government
Department of Finance

MINUTE

s22

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

Act of Grace Requests – s22

Due Date: Friday 1 October 2021

Recommendations:

That you:

- i. **agree to decline** s22 act of grace payments, totalling s22
s22 under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)*,

AGREED / NOT AGREED

- ii. **sign** s22 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 s22 statements of reasons.

NOTED / PLEASE DISCUSS

s22

A/g Assistant Secretary
Significant Matters Taskforce
1 October 2021

Key Issues:

On 12 October 2020, Finance receive s22

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

Official: Sensitive: Legal

2. In making your decision, you need to consider the full contents of the Finance files that relates to the s22 requests, including but not limited to the following documents:

- a. s22 act of grace request on behalf of s22, 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. s22 responses to the Treasury’s statements dated 22 July 2021 and 27 August 2021.
- e. s22 response to ASIC’s submissions, dated 3 February 2021 and 22 April 2021.

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3. In summary, s22 claim that:

- a. ASIC was defective in the performance of its regulatory duties, which led to losses for s22
- b. s22 make a large number of arguments in support of this claim, including that ASIC failed to:
 - i. Prevent the s22
 - ii. Prevent the s22
 - iii. Prevent significant losses for s22
 - iv. Take sufficient enforcement action.
- c. ASIC’s failure to regulate s22. As such, s22 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 s22 is unfair and inequitable.

s22 full submissions are available at Attachment B. All s22 individual impact statements are available at Attachment C.

Agency Claims

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Reasons:

5. On balance, it is recommended that you decline s22
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 s22 (i.e. not the Commonwealth) to make appropriate judgments and take responsibility for their own investment decisions.
 - b. While unfortunate, the circumstances s22 have not arisen as a result of the Commonwealth, nor are they 'special'.
 - c. Instead, based on evidence provided, the actions of s22 was a key cause of s22 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 s22, 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 s22

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9. For s22 has provided Individual Impact Statements, articulating the individual impact and financial losses s22. Each of these statements have been provided to you and the claims considered on their merits. The individual impacts have been reflected in s22 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:

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Discretionary Payments Section
Significant Matters Taskforce
1 October 2021