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CDDA Scheme Review Secretariat  
Department of Finance  
1 Canberra Avenue, Forrest ACT 2603

By email:

[CDDAReview@finance.gov.au](mailto:CDDAReview@finance.gov.au)

Dear Mr Cornall,

**Review of the *Compensation for Detriment Caused by Defective Administration (CDDA) Scheme* in relation to the Australian Taxation Office (ATO) and small business.**

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

Given the engagement with the ATO and other regulators by our members and our experience with the tax and superannuation systems, CPA Australia submits that:

- The entire CDDA Scheme should explicitly include compensation related to digital systems
- A broader operating framework including service agreements and rights of appeal should be considered
- Examples of successful claims and further guidance should be published
- Provisions for compensation should be included in major IT project budgets by government agencies, including the ATO
- Consideration should be given to providing an advocate for CDDA applicants, similar to the United States
- The Commonwealth Ombudsman, Inspector General of Taxation or other independent adjudicator should hold the power of review.

While we note that the terms of reference for the review are limited, we believe it is important that the CDDA Scheme can and should be improved across government and recommend that the Review's final report make recommendations that have broader application than just to the ATO and small business. CPA Australia's comments in response to the specific issues listed in the Terms of Reference are enclosed.

If you have any queries do not hesitate to contact Gavan Ord, Manager Business and Investment Policy at CPA Australia on [gavan.ord@cpaaustralia.com.au](mailto:gavan.ord@cpaaustralia.com.au) or 03 9606 9695.

Yours sincerely



Dr Gary Pflugrath CPA  
Head of Policy and Advocacy

Encl.

## 1. Perceptions that the scheme does not always adequately compensate small business taxpayers for the effect of defective administration

### The purpose of the CDDA Scheme

The CDDA Scheme (the Scheme) is a discretionary mechanism to allow entities to pay compensation when there is no legal requirement to do so. The Scheme needs to be fit for purpose and support the ATO in maintaining the confidence and engagement of taxpayers, tax agents and the community. It needs to be available to redress the impacts of rapidly evolving, technology-reliant and complex tax and superannuation systems when things go wrong. The issues raised by this Review are not exclusive to small businesses, nor to the ATO, but rather should be considered in a whole-of-government context.

From a user experience perspective, the Scheme should accommodate a wide variety of claims and the ATO needs to ensure a comprehensive, consistent and transparent approach for all claims related to its administration. The Scheme should not be viewed as pointless, a negative experience or as protecting ATO interests.

However, the limited number of claims submitted and the smaller number that are successful may reflect the low confidence in the CDDA Scheme and may drive the perception, especially across the tax profession, that the prospects of success are low and not worth the cost, effort and time expended.

This is compounded by the power differential between the ATO and a small business who may not have the acumen, resources or time to pursue compensation. The process may be stressful and can prove a distraction from core business.

### Taxpayer recourse limited by the definition of defective administration

The ATO's scope of defective administration is currently limited to administrative procedures and advice and does not appear to include services or systems. The potential for the ATO to cause detriment through its administration of the tax and superannuation systems is far greater due to its multi-faceted roles across service delivery, compliance, debt collection and regulatory enforcement. This may include delays in payments of refunds due to IT issues or significant, unforeseen digital systems failures such as those experienced in the past decade.

CPA Australia members have also been advised by the ATO that to prove detriment to them in the case of client-related affairs, costs need to be raised against the client before applying to the ATO for compensation. This is often something that is not in either parties' best interests and nor is it efficient; a more streamlined and less bureaucratic approach would be beneficial.

### Compensation for defects in Government digital systems

As reflected in our 2017-18 pre-budget submission to The Treasury<sup>1</sup>, CPA Australia recommends the ATO set aside contingent funding for compensation in recognition of losses businesses may face

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<sup>1</sup> CPA Australia, [2017-18 pre-budget submission](#), 7 March 2017

because of significant interruptions and related economic loss caused by problems arising from digital systems failures.

As was demonstrated by ATO systems outages in December 2016 and February 2017, and the preceding Change Program, the increasing reliance of intermediaries and businesses more generally on Government digital systems<sup>2</sup> means that failures can have significant negative impacts on business – potentially leading to economic loss and distress – but notably, no CDDA claims were accepted. This circumstance was noted by the Inspector General of Taxation in his report on the *Future of the Tax Profession*<sup>3</sup> where he reiterated his view that the CDDA scheme should be improved, or a separate scheme for tax administration with rights of review be created.

Feedback to CPA Australia over the years shows members of the profession have found the ATO's compensation policy<sup>4</sup> and the Department of Finance administration of the act of grace payment system<sup>5</sup> to be inadequate, with few tax agents ever qualifying for compensation in circumstances such as government agency IT failure.

Despite the mandatory requirements imposed on practitioners and businesses to utilise ATO systems to lodge and report information, there are no service agreements provided by the ATO which can form the basis of determining whether the administration has been defective. While the ATO is now publishing service commitments and system availability, this falls short of performance agreements such as those used for public transport which entitle eligible users to compensation if service falls below a standard<sup>6</sup>. This is supported by the Inspector General of Taxation who recommends:

*"[the ATO] align its service standards for the performance of its systems with those of commercial providers, including a dedicated scheme for compensation where outages or system failures result in loss for the users."*  
Recommendation 4.2(g), *Future of the Tax Profession*<sup>7</sup>

#### CPA Australia recommends:

- The Review should consider the purpose, intent and outcomes of the Scheme and suggest evaluation measures to assess the ongoing effectiveness of the ATO's administration of the Scheme.
- Consideration should be given to the development of service agreements, performance standards and entitlement to compensation under the Scheme.
- Specific processes should be designed for tax agents and advisors (i.e. third parties) to seek compensation in relation to the impact on their businesses arising from defective ATO administration without imposing an unnecessary burden on their clients.
- Provisions for compensation should be included in the ATO Budget and as line-items in large change or IT projects.

<sup>2</sup> Examples include Standard Business Reporting, Single Touch Payroll, myTax, Portals (Tax Agent, BAS Agent, Business), Australian Business Register, Taxable Payments Annual Report

<sup>3</sup> p. 80, Inspector General of Taxation, *The Future of the Tax Profession*, Commonwealth of Australia, April 2019

<sup>4</sup> ATO, *Applying for compensation*, viewed 4 March 2019

<sup>5</sup> Department of Finance, *Information for applicants – act of grace requests*, viewed 4 March 2019

<sup>6</sup> For example, see Victoria's Metro Trains compensation thresholds and claim process.

<sup>7</sup> p. 85, Inspector General of Taxation, *The Future of the Tax Profession*, Commonwealth of Australia, April 2019

## 2. Independent decision-making in relation to CDDA claims

CPA Australia acknowledges the efforts of the ATO to structure itself to remain objective, however there is an inherent tension when an administrator is tasked to decide whether its administration is defective and has caused detriment. Even where decisions can be shown to be independent and publicly defensible, the issue of perceived bias remains.

ATO General Counsel officers assess the claim using information provided by the applicant. The extent to which General Counsel seek internally-held information or input from the employees or officers against whom the claim is made is unclear.

There is no mention of an advocacy support service for applicants and the ATO guidance states there is no automatic administrative right of review. Decisions can be referred to the Inspector General of Taxation, but his or her findings are non-binding on the ATO.

While each claim will have unique aspects, decisions are not published nor are there examples of valid compensation claims to provide guidance to taxpayers. In contrast, the US Taxpayer Advocate provides success stories<sup>8</sup>.

The above factors illustrate several weaknesses in terms of assuring the independence of the ATO-led process.

The ATO was one of the agencies reviewed in the Commonwealth Ombudsman's 2009 report<sup>9</sup> and, from an external perspective, has broadly addressed the recommendations within its control. The ATO disagreed with the Report's view of the reliance on legal concepts and approaches was noted at paragraph 4.2 and it asserted that its approach was not 'legalistic'. Greater transparency in the decision-making process, such as the publication of a law administration practice statement, would assist in providing transparency and assurance around the decision-making process.

The recommendation related to the establishment of an inter-departmental advisory or review panel has not progressed, however the argument for some form of oversight to ensure consistency and equity in administrative decision making across agencies remains valid.

### CPA Australia recommends:

- Some form of taxpayer advocacy should be incorporated into the ATO's Scheme process.
- An inter-departmental review panel should be considered to ensure consistent and independent decision making.

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<sup>8</sup> Taxpayer Advocate Service, [How we've helped](#), United States, viewed 8 March 2019

<sup>9</sup> Commonwealth Ombudsman, [Putting things right: compensating for defective administration](#), Commonwealth of Australia, August 2009

### 3. Processes, adequacy of compensation and impacts on small businesses

#### Previous recommendations from the Inspector General of Taxation

The Inspector General of Taxation's Review into the ATO's change program<sup>10</sup> in 2010 recommended:

- *For the purpose of minimising risks arising in future large, complex ICT projects, the IGT recommends that the ATO consider for future projects, whether it should have guidelines in place early in the development of the project to assess and process claims for compensation by members of the community for substantial detrimental impacts imposed (Recommendation 5, Chapter 4), and*
- *For the purpose of addressing tax practitioners' concerns with the basis for, and process to obtain, compensation, the IGT recommends that the ATO work with the tax practitioner community to robustly and openly reconsider its position on compensation claims under the CDDA scheme and the process by which such claims should be made. (Recommendation 6, Chapter 4).*

In relation to the CDDA, the ATO reflected the Department of Finance guidance<sup>11</sup> in its response:

*... we do not consider that the time taken to implement our Change program and process tax returns amounts to defective administration within the meaning of the CDDA scheme.*

*In determining whether there has been defective administration, the test is not what would or should have occurred in a perfect world, but what a reasonable person would expect given the same circumstances, same powers and access to resources.*

*The assessment of defective administration must be based on what another reasonable agency could achieve with the same circumstances, powers and resources, and such a comparison would not lead to a conclusion that the Tax Office has been defective or unreasonable in its implementation. (Chapter 4)*

The basis upon which such a comparison was made, and the measures used to support the assertion were not published.

A pre-implementation assessment of risks, client impacts, and potential negative outcomes would support post-implementation assessment and decisions in relation to compensation payments. This would reduce the perceived or actual subjectivity of CDDA claim decisions.

#### Adequacy of compensation and small business impacts

The ATO's 2017-18 Annual Report shows 166 finalised compensation claims with 76 resulting in an offer of compensation. The payments made totalled \$409,035 with a median payment of \$495 and average of \$7,575.<sup>12</sup>

CPA Australia member feedback indicates that based on known likelihood and value of successful claims, it is rarely worth the cost and effort to apply for compensation. As such, the volume of compensation claims received by the ATO is likely to not fully represent the breadth of issues experienced by small businesses in dealing with the ATO.

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<sup>10</sup> Inspector General of Taxation, [Review into the ATO's change program](#), Commonwealth of Australia, December 2010

<sup>11</sup> Paragraph 46, Department of Finance, [Scheme for Compensation for Detriment caused by Defective Administration – Resource Management Guide No. 409](#), Commonwealth of Australia, May 2017

<sup>12</sup> P.192, ATO, [Annual Report 2017-18](#), Commonwealth of Australia, 2018

CPA Australia members have provided the following examples of detriment caused by ATO IT systems that were not claimed:

- Five-month delay in receipt of fee revenue of \$50,000 for a tax agent business that was needed to pay employees
- Six-month delay in receipt of tax refund of \$37,000 for a small business needed to pay other liabilities
- Use of credit cards, bank overdrafts and mortgages to access working capital at punitive interest rates while ATO delays significantly impacted cash flow
- Inability to access bank overdrafts due to delays in receiving Notices of Assessment to provide to the bank, and
- Large amounts of overtime, including overtime payments to staff, to maintain practice viability.

#### **CPA Australia recommends:**

- Projects with potentially large taxpayer and business impacts should include an assessment of risks and potential costs of implementation and include measures and standards against which compensation claims can be assessed. Early resolution mechanisms should be included in the project design.
- A law administration practice statement should be published on the Scheme.
- The ATO should publish examples of successful claims and the information provided to achieve such results.

#### **4. Best mechanisms to provide small business with access to a fair, efficient, accountable and transparent system for administrative review**

##### **The optimal system**

The current three pathways for compensation – litigation, CDDA Scheme and Act of Grace – create uncertainty for a taxpayer and their representatives. For those unfamiliar with these mechanisms, it is difficult and costly to engage lawyers to represent their best interests and identify the most appropriate mechanism. Appendix One is a generic flowchart that reflects the complexity and burden faced by a small business and their representatives when seeking compensation.

Further, the CDDA Scheme offers no right of appeal, in contrast to litigation and Act of Grace decisions.

##### **Approaches in other jurisdictions**

Taxpayers in other jurisdictions may be able seek compensation for a broad range of issues including unreasonable delays or disregarding provisions.

**United Kingdom:** an independent Adjudicator's Office has been established to look at escalated complaints regarding Her Majesty's Revenue & Customs and the Valuation Office. Its scope includes mistakes, unreasonable delays, poor or misleading advice, processes, whether a policy has been

followed, inappropriate staff behaviour and the use of departmental discretion<sup>13</sup>. It can review HMRC compensation decisions and in 2017-18 paid £576,562 in redress from 389 upheld or partially upheld outcomes out of 1,181 complaints referred to them<sup>14</sup>.

**United States:** the Taxpayer Bill of Rights enshrines taxpayer rights at law and enables a taxpayer to recover up to \$1 million. The Taxpayer Advocate is an independent representative of taxpayers' interests before the Internal Revenue Service<sup>15</sup>. IRC § 7433 provides that taxpayers may sue the United States if, in connection with the collection of any federal tax, a Service officer or employee recklessly or intentionally, or by reason of negligence, disregards any provision of the Internal Revenue Code or implementing regulations.<sup>16</sup>

**Canada:** the Taxpayer Bill of Rights enshrines taxpayer rights at law<sup>17</sup> and the *Crown Liability and Proceedings Act* makes the Crown liable for damages resulting from torts by servants of the Crown<sup>18</sup>.

**New Zealand:** administrative law matters and torts are litigated through the civil courts.

#### CPA Australia recommends that consideration be given to:

- A legislated Taxpayer Bill of Rights
- More detailed guidance on the process and options for litigation/claims
- Establishment of an independent adjudicator with the power to review ATO compensation decisions, or provide the Inspector General of Taxation or Commonwealth Ombudsman with such a power.

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<sup>13</sup> P. 8, [Adjudicator's Office Annual Report 2018](#), Adjudicator's Office, United Kingdom, 2018

<sup>14</sup> P. 16, [Adjudicator's Office Annual Report 2018](#), Adjudicator's Office, United Kingdom, 2018

<sup>15</sup> [Taxpayer Advocate Service](#), United States viewed 8 March 2019

<sup>16</sup> Legal Information Institute, [26 U.S. Code § 7433. Civil damages for certain unauthorized collection actions](#), viewed 8 March 2019

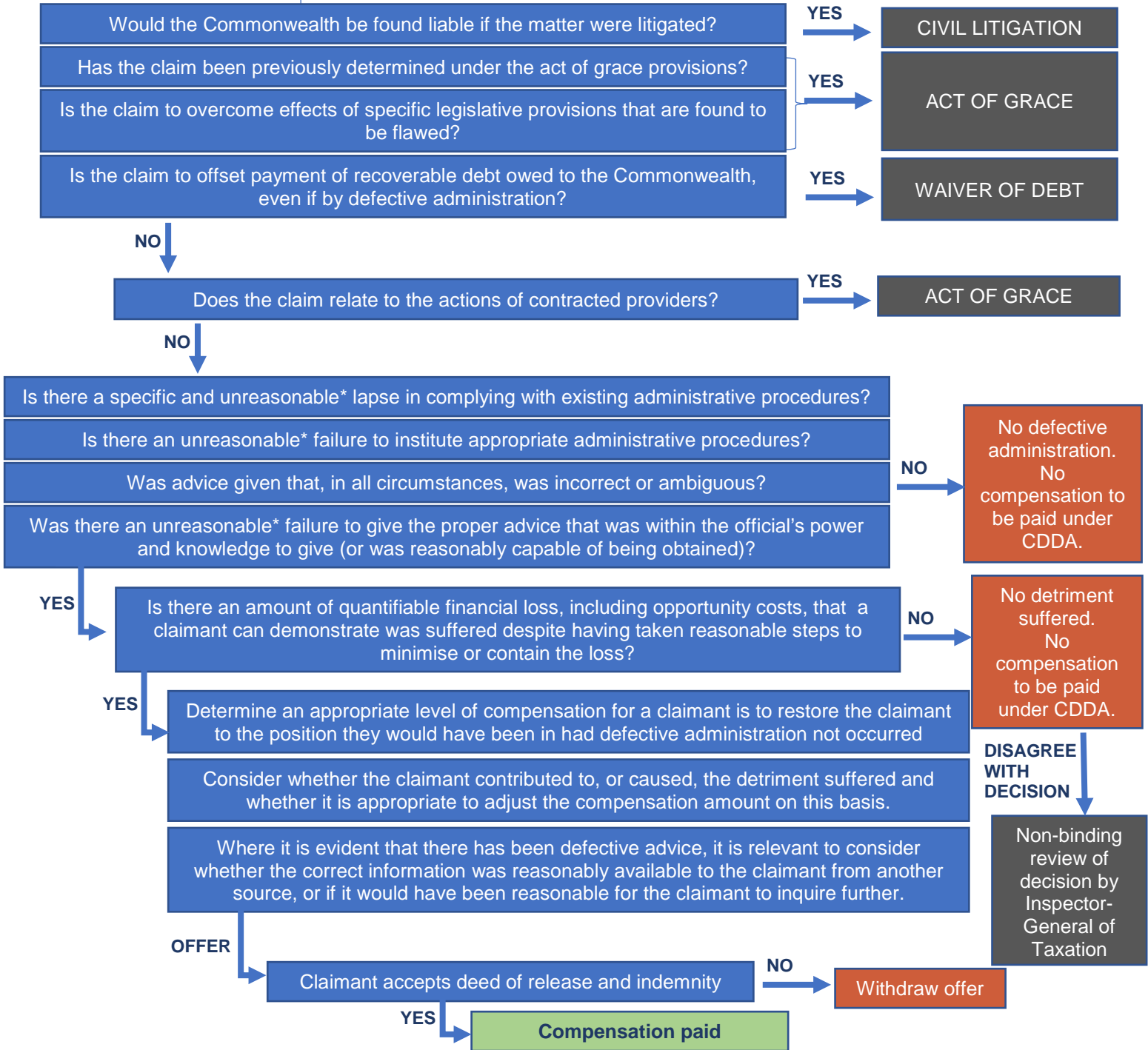
<sup>17</sup> Canada Revenue Service, [Taxpayer Bill of Rights](#), Canada

<sup>18</sup> *Crown Liability and Proceedings Act*, [R.S.C. 1985, c. C-50, s. 21\(1\)](#).



**Appendix One – Adapted from Scheme for CDDA Resource Management Guide No. 409**

**Compensation claim**



\* An unreasonable lapse or failure is one where the actions of the official(s) involved are considered to be contrary to the standards of diligence that the entity expects to be applied by reasonable officers acting in the same circumstances with the same powers and access to resources.