

5 April 2018

Mr Robert Cornall  
CDDA Review Secretariat  
Department of Finance  
One Canberra Avenue  
FORREST ACT 2603

Email: [CDDA review mailbox](#)

Dear Mr Cornall

## Review of the Scheme for the Compensation for Detriment caused by defective administration in relation to the Australian Taxation Office and Small Business

Chartered Accountants Australia and New Zealand (CAANZ) welcomes the opportunity to contribute to the review of the Scheme for the Compensation for Detriment Caused by Defective Administration (the CDDA Scheme) in relation to the operation by the Australian Taxation Office (ATO) of the CDDA Scheme for the small business taxpayer segment.

The terms of reference for the review indicate that it will consider:

- the consistency of the ATO's CDDA Scheme processes for small businesses,
- the timeliness of decisions,
- how effectively findings are communicated to small business,
- how independent decision-making can be best achieved in future; and
- the adequacy of compensation for small businesses that have suffered an economic and / or personal loss as a consequence of the ATO's actions.

CAANZ has over 120,000 members, many of whom are themselves small businesses which have small business clients and deal with the ATO on a daily basis. We have requested that our members provide us with experiences with the CDDA Scheme. To date, we have not received any feedback from our members in relation to your review. Accordingly, our comments are general in nature.

The comments below are therefore based on discussions with CAs in CA ANZ tax knowledge sharing forums etc.

### CDDA and technology failure

Increasingly, there is a greater reliance by taxpayers and tax agents on digital interactions with the ATO. When the ATO went through its digital change programme some years ago and later experienced major outages in 2016 and 2017, we understand there were some claims made under the CDDA programme by both taxpayers and tax agents for compensation. Our understanding is that claims made by tax agents were rejected by the ATO on the basis that there was no defective administration and that there was no demonstrable loss.

There appears to be a difference between what tax agents and the ATO consider to be defective administration and what can be claimed in compensation. This debate has not progressed since the

2011 Inspector General of Taxation's (IGOT) report into his "Review of the ATO's Change programme" as the ATO did not agree with the IGOT's recommendation that the ATO work with the tax practitioner community to robustly and openly reconsider its position on these issues.

Whilst there are no issues currently with the ATO administration of information technology, it is unlikely given the rapidly changing world we live in that this will remain the case. Consideration of how these issues could be resolved in event of a future digital disruption would be worthwhile. Appendix A discusses these reviews in greater detail.

Apart from CDAA, one issue which we feel the ATO should seriously consider is a tax technology service standard for taxpayers and tax practitioners which, amongst other matters, provides *automatic* administrative relief (e.g. extended time to lodge tax documents).

### **Dispute resolution under CDAA**

It seems difficult to dispute an ATO decision regarding the CDAA scheme. The IGOT's 2011 report noted that a number of tax agents had appealed ATO decisions to the Ombudsman and "received a response that the Ombudsman could not stand in the shoes of the Commissioner in relation to these decisions and could only examine the process taken to arrive at the decision"<sup>1</sup>.

### **Help with CDAA matters**

The role, if any, of the IGOT, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), and the latter's Tax Concierge Service in CDAA matters is also unclear.

### **Education and transparency**

Our sense is that tax practitioners lack a detailed understanding of CDAA, and it would be beneficial if the [ATO website on this topic](#) could be reviewed and improved. In particular, there are no de-identified examples or case studies of situations where compensation has or has not been provided. Knowledge of CDAA outcomes should, in our view, be better shared.

Should you wish to discuss any of our comments please call me on 02 9290 5609 or I can be contacted via email on [michael.croker@charteredaccountantsanz.com](mailto:michael.croker@charteredaccountantsanz.com).

Yours sincerely



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<sup>1</sup> Paragraph 3.212 of the report

## Appendix A

### Previous reviews of the CDDA Scheme

The CDDA Scheme has been subject to previous reviews. Some of these reviews include:

- August 2009 – Commonwealth Ombudsman “Putting things right: compensating for defective administration”
- 6 December 2010 – Senate Standing Committee on Legal and Constitutional Affairs “Review of government compensation payments”
- May 2011 Inspector General of Taxation’s [“Review into the Australian Taxation Office’s Change Program”](#)
- December 2016 Inspector General of Taxation’s [“Review into the Taxpayer’s Charter and taxpayer protections.”](#)

In his Review of the ATO’s Change program the IGOT noted that *“Tax practitioners also argued that although taxpayers may be compensated for delays in receiving refunds, tax practitioners were not compensated for the adverse impacts of these delays. They argued that compensation should be paid on the basis of two main grounds:*

- *for unproductive work in unnecessarily chasing the progress of delayed returns due to a combination of the system’s problems and the ATO’s communications*
- *the adverse impacts of reduced expected cash flows.”*<sup>2</sup>

The ATO declined the tax practitioner claims on two grounds:

- 1 There was no defective administration.

The ATO stated that it came to this conclusion as “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 reality is that no implementation of a major computer upgrade of the kind undertaken by the Tax Office could be achieved without some delay or minor processing issues....the fact that there have been delays and some processing issues does not mean that there is defective administration. The assessment of defective administration must be based on what another reasonably 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”<sup>3</sup>

- 2 Losses were not ‘real.’

The ATO argued that “the claim for loss of earnings is not a quantifiable loss until the end of the financial year, and even then it would be difficult for the tax agent to establish that such a loss was caused by the implementation of the change program and not other factors. The likely scenario is that there may have been a slight decrease in income during the implementation months, but once the returns were being processed, then the money due to the tax agent should

<sup>2</sup> Paragraph 3.204 of the report

<sup>3</sup> Paragraph 3.210 of the report

have been paid, and should essentially equate to the amount that would have been paid if the implementation had not occurred.

Another argument against compensation is that the tax agents have not done all they could to mitigate any loss. It appears that the tax agents who are most disgruntled are those who take their fees from refunds. This is a business model that the tax agent has chosen to apply, and as such they are responsible for any risks associated with that strategy, including any delay in refunds being received, for whatever reason. Further, tax agents were on notice that there would be some delay in processing returns, and could have modified their fee structure appropriately,”<sup>4</sup>

After considering these issues the IGOT stated “that the ATO should, in consultation with the tax practitioner community, robustly and openly reconsider its position on compensation claims under the CDDA Scheme in light of the facts above and, in the event that the ATO decides to change its position on these claims, reconsider the processes by which such claims be made.” The ATO rejected this recommendation and stated that “the CDDA scheme does not operate on the basis which involves consultation about findings of defective administration.”<sup>5</sup>

The December 2016 IGOT “review into taxpayer’s charter and taxpayer protections” also considered the CDDA scheme. In this report the IGOT noted that:

“4.31 In cases where taxpayers have succeeded in meeting the threshold criteria, submissions made to the IGT have observed that the CDDA Scheme does not adequately address productivity loss, opportunity costs (particularly for tax practitioners) or psychological injury (for example, stress and depression). It has been suggested that taxpayers should be able to seek financial compensation for time expended and emotional stress, with one submission expressing the concern as follows:

*... in our experience, one of the key causes of financial loss in relation to pursuing the ATO for failure to uphold the Taxpayers Charter is the time and effort which has to be given up or diverted from other endeavours in order to undertake a time-consuming pursuit of redress from the ATO. In the context of a small business, for instance, this is time taken away from running the business, including generating sales. It is not unreasonable to expect that taxpayers should be able to seek financial compensation for the time spent in clearing up a mess largely created by the ATO. Similarly, the emotional stress involved in dealing with ATO compliance activity can be severe. Where it turns out that that ATO activity was not justified, the taxpayer should have redress to compensation.*

4.32 Similarly, some stakeholders have indicated that the CDDA Scheme does not adequately compensate for losses arising from major ATO changes in process or information technology (IT). Tax practitioners, in particular, are keen to see a better compensation mechanism put in place to support tax practitioners inadvertently impacted by systems modernisation, such as the upgrades required as a result of the government’s digital-by-default initiatives. Concerns have also been raised by tax practitioners regarding the limitations to the CDDA Scheme in compensating for losses incurred as a direct result of Tax Agent Portal performance and system errors.”

The IGOT then noted that:

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<sup>4</sup> As above

<sup>5</sup> Paragraph 4.113 of the report

“4.49 One area in which further guidance could be given is compensation for non-economic loss. Non-economic loss may include matters such as stress or anxiety, depression or productivity losses as a result of ATO interactions. As noted above, the ATO’s website indicates that claims for personal time expended, stress or other emotional distress as well as costs associated with audits, objections and appeals are generally not compensable. However, it is understandable that taxpayers and tax practitioners may view this to be at odds with [RMG 409](#) which indicates that compensation may be approved for non-economic losses:

63. *Non-economic loss claims may relate to personal injury (including psychiatric injury), emotional distress or damage to reputation.*
64. *Compensation for personal injury loss would be generally limited to the types of personal injury compensable in legal practice and principle. Entities must look to legal principle and practice when determining an appropriate amount to quantify the claimant’s loss.*
65. *Compensation under the CDDA Scheme is not payable solely for grief or anxiety, hurt, humiliation, embarrassment, disappointment, stress or frustration that is unrelated to a personal injury which is being compensated under the CDDA Scheme, no matter how intense the emotion may be.*<sup>333</sup>

4.50 Whilst non-economic loss can have an impact on taxpayers, it can also affect tax practitioners whose day-to-day work is impacted by ATO system outages or other actions, such as the Tax Agents’ Portal being down, preventing tax practitioners from completing their lodgement work. The IGT has been informed that tax practitioners have met with significant difficulty in seeking compensation for losses of this kind.”

# Appendix B

## Chartered Accountants Australia and New Zealand

CA ANZ is made up of over 120,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over.

Members of CA ANZ are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business.

We focus on the education and lifelong learning of members and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.