



INSTITUTE OF  
**PUBLIC  
ACCOUNTANTS®**

**Review of the  
Scheme for  
Compensation for  
Detriment Caused  
by Defective  
Administration**

## **Introduction**

The Institute of Public Accountants (IPA) welcomes the opportunity to offer our “Review of the Scheme for Detriment Caused by Defective Administration (CDDA)” submission. We look forward to working with the Government in providing feedback on the current inadequacies of the CDDA Scheme for tax practitioners who are seeking compensation from the ATO for defective administration, particularly where there are failures in ATO technology.

The IPA is one of the three professional accounting bodies in Australia, representing over 36,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors.

We look forward to discussing in more detail the IPA’s submission and its recommendations. Please address any further enquires to Tony Greco, General Manager Technical Policy via [tony.greco@publicaccountants.org.au](mailto:tony.greco@publicaccountants.org.au)

10 June 2019

Mr Robert Cornall  
CDDA Review Secretariat  
Department of Finance

CANBERRA ACT 2600

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

Dear Mr Cornall

### **Review of the Scheme for Compensation for Detriment Caused by Defective Administration**

The IPA welcomes the opportunity to provide this submission in response to the Government's review of the Scheme for Compensation for Detriment Cause by Defective Administration (the CDDA scheme) as announced on 25 February 2019.

The CDDA scheme allows Commonwealth Government agencies to pay discretionary compensation when a person or organisation has suffered detriment as a result of defective administration, but when there is no legal requirement to make a payment. According to the Government's announcement, the review has been specifically commissioned to consider the operation by the Australian Taxation Office (ATO) of the CDDA scheme in relation to small business.

In this case, our submission focuses on the inadequacy of the current CDDA scheme for our members who are largely tax practitioners and who themselves operate small businesses in their own right. With about 75% of individuals and 95% of small businesses relying on the services of a registered tax agent, our members therefore play a crucial role in upholding the integrity of the Australian tax system.

### **Executive summary**

In our view, the current CDDA scheme is not fit for purpose and falls short of the expectations of the tax practitioner community, particularly in situations where the monopolistic nature of ATO technology fails to deliver.

The CDDA scheme does not compensate tax practitioners for opportunity costs or reputational damage caused by systems being unavailable or deployment of new systems where there are major operational flaws. Under the current scheme, these types of losses are not specifically covered which, amongst other things, leads to so few claims being lodged by practitioners.

Specifically, the inadequacy of the CDDA scheme falls upon the ATO's narrow interpretation as to what constitutes "defective administration" which prevents what we consider to be legitimate claims for tax practitioners to be rejected.

We therefore recommend that the Government consider and implement a fairer and more accessible CDDA scheme where tax practitioners are entitled to compensation where there are reasonable grounds to do so for both economic and non-economic losses.

The review comes at a time when professional accountants are facing increasing regulation and compliance. This is resulting in increased costs and time burden in servicing clients. It is critically important that the environment in which practitioners operate in taken is taken into consideration in the review.

### **Failure in ATO technology and defective administration**

Tax practitioners are at the mercy of the ATO when systems fail to deliver as there is absolute reliance placed on these systems in making taxpayer lodgments.

The major outages in late 2016 and 2017 and the ATO's change program where a new IT system was deployed are prime examples of such technology failures. With respect to the latter, the issues faced by tax practitioners had included such things as:

- deployment of software that contained deficiencies and major flaws
- ceasing to receive ATO correspondence/ communications, and
- outages which extended beyond the ATO's standard service period.

To our knowledge, the claims made by tax practitioners for financial losses incurred from these above events under the CDDA scheme have been rejected by the Commissioner of Taxation (the Commissioner) on the grounds that the system failures are taken not to be “defective administration”.

The issue as to what constitutes “defective administration” remains unresolved since the Inspector-General of Taxation’s (IGT) “Review into the Australian Taxation Office’s change program” (Change program review). In that review, the ATO disagreed with the recommendation of the IGT that it “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”.

The ATO had cited in the review that there was no defective administration as the issues arising could be reasonably expected and that the losses incurred were not ‘real’ as these costs are subsequently recouped.

While ATO systems have since been free from unexpected outages, in this digital age, there is a sense of inevitability that systems are capable of suffering an outage at any point in time. When such occurrences arise, the community not only expects that the problem be rectified quickly but those who suffer losses are appropriately compensated for their financial losses and inconveniences suffered. For example, Australian financial institutions, such as NAB, in more recent times have had to remediate and compensate business owners where there have been EFTPOS outages.<sup>1</sup>

No different to those in the corporate sector, Australian taxpayers therefore expect, as ‘clients’ and consumers of government services, expect their agencies to compensate them where there are financial losses suffered from technology failures.

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<sup>1</sup> <https://www.afr.com/technology/enterprise-it/nabs-payments-systems-outage-cost-it-millions-in-compensation-20181116-h17ysd>

In this regard, we contend that the ATO's interpretation of "defective administration" is no longer appropriate in light of failures in technologies giving rise to economic and non-economic losses. Such technology failures were also acknowledged by the Commonwealth Ombudsman as a sound basis for compensating for defective administration.

This was observed by the IGT in the 2011 change program review as follows:

3.207 The tax professional representative bodies argued that compensation should be initiated by the ATO, as requiring tax practitioners to lodge claims for compensation would exacerbate the adverse impacts they had suffered. They argued that this compensation should be based on an agreed set of factors including the number of tax practitioners' clients, and that they should be involved in the process to ensure the right factors are taken into account.

3.208 They pointed to the Commonwealth Ombudsman's *Compensation for detriment caused by defective administration — Fact Sheet 9*, which specifically states as a common example of a payment under the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme) being made where a 'person incurs expenses or loses eligibility for a benefit because ... a computer error results in a delayed payment'. The Fact Sheet also states that avoiding a legalistic approach is best practice as the agency should consider the claim 'from the perspective of a moral obligation and should not involve a compensation minimisation approach'.

The ATO's narrow interpretation of "defective administration" is contrary to the Ombudsman's Fact Sheet. Consequently, this has dissuaded impacted practitioners from making legitimate claims for compensation. Many have been resigned to the fact that no matter how compelling and well supported their basis for redress might be, the ATO's response to any claims for financial compensation would likely be in the negative.

### **Detriment warranting compensation**

Where tax practitioners suffer an ATO outage which prevents them from accessing the tax agent portal or from lodging returns for their clients, the types of economic and non-economic losses suffered can include, but are not limited to, the following:

- Loss of income and opportunity costs

- Loss of productivity
- Psychological injury (such as stress and anxiety), and
- Reputational damage.

With respect to the loss of income and opportunity costs, it would be easy to argue that tax practitioners pass on their additional costs to the client in order to recoup their loss time. In the majority of situations however the reality is that these costs are borne by the practitioner as most clients are not willing to pay for additional work that was a result of practitioners addressing an ATO systems failure.

A clear inadequacy of the current CDDA scheme is that it also does not contemplate psychological injury and reputational damage as part of its remit. The untold stress on tax practitioners to ensure that lodgments are made where there are systems outages should also not be discounted nor dismissed. Business clients all requiring their Business Activity Statements lodged at the same time so that they can obtain their cash refunds is one example where practitioners can be under significant stress because they cannot properly service their clients. Such occurrences can also lead to reputational damage for the practitioner notwithstanding that the impact is outside their control.

Admittedly, while it can be difficult to quantify these types of non-economic losses, we contend that compensating for such losses warrant inclusion in any proposed changes to the CDDA scheme. Further, to reduce the costs to tax practitioners of submitting a claim under the CDDA scheme, consideration should also be given to blanket redress arrangements in situations where all tax practitioners are impacted by defective administration by the ATO (such as an unexpected and sustained nationwide outage).

### **Independent review of the ATO's decision**

The current CDDA scheme operates at the discretion of the ATO and does not provide scope for the review of the ATO's decision where a tax practitioner's claim is declined.

Previously, some tax practitioners have sought the views of the Commonwealth Ombudsman as to whether there is legitimacy to their claims however, as observed by the IGT (at para. 3.212 of the change program review), “the Ombudsman could not stand in the shoes of the Commissioner in relation to these decisions and could only examine the process taken to derive at the decision”.

Under any revised CDDA scheme, we consider that there should be some grounds to appeal the claim made to the ATO and have it reviewed and if successful, overturned by an independent party.

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We trust that you will find our submission of value. Please feel free to contact us directly should you require further clarification on any of the issues raised or other questions related to our submission. As stated above, the review comes at a time when professional accountants are facing increasing regulation and compliance, which has resulted in increased costs and time burden in servicing clients. This applies particularly to smaller practitioners who are under increasing pressures from all quarters. It is critically important that the environment in which practitioners operate in taken is taken into consideration in the review

Yours sincerely



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