

Government Response to the independent review into the Compensation for Detriment caused by Defective Administration (CDDA) Scheme in relation to the Australian Taxation Office (ATO) and Small Business

The Review

As part of a range of measures announced in the 2018-19 MYEFO Small Business Package that was designed to make it easier for small businesses to operate, the Government undertook a review of the ATO's administration of the Compensation for Detriment caused by Defective Administration (CDDA) Scheme. The CDDA scheme provides a discretionary mechanism for Ministers (or their authorised agents) to award compensation if an individual (or more specifically, in this case, a small business) has suffered detriment because of an agency's defective administration.

The CDDA scheme can play an important role in supporting small business in in the small number of cases where mistakes are made, and it is important that the scheme is understood and accessible to small businesses.

Response to the Review

The Government is pleased to accept all 12 recommendations either in full, in part, or in principle and will work to implement them from 30 November 2019.

The Government acknowledges that small businesses are the cornerstone of the economy and when they prosper, so does the rest of Australia. The Government's response demonstrates its ongoing commitment to making it easier for small businesses to thrive and receive compensation where appropriate.

Response to Recommendations

Recommendation	Response
<p>1 That good practice in the management of CDDA claims in the ATO would involve briefing and conferring with each new portfolio Minister with CDDA Scheme responsibility in regard to:</p> <p>1.1 the Minister's primary role in relation to the Scheme and potential accountability for CDDA decisions</p> <p>1.2 fresh authorisations for specific ATO officers to investigate CDDA claims and make CDDA decisions as agents of the Minister within specified limits</p> <p>1.3 the Minister's instructions and guidance about the administration of the CDDA Scheme on the Minister's behalf, and</p> <p>1.4 how the ATO proposes to administer and report on the Scheme in accordance with the Minister's instructions and guidance (if any) and Finance's Resource Management Guide No 409.</p>	<p>The Government accepts this recommendation. The ATO briefed the incoming Assistant Treasurer in June 2019.</p> <p>1.1 and 1.4: Management of CDDA claims will be incorporated in briefings to all new portfolio Ministers.</p> <p>1.2: Fresh authorisations were issued following the ATO's brief in June 2019.</p> <p>1.3: The ATO will work with the Minister to develop revised guidance about the ATO's administration of the CDDA scheme.</p>

2	<p>That the ATO further develop its procedures for handling claims for compensation in a more comprehensive CDDA Manual which includes:</p> <p>2.1 categorising claims into three categories (straight forward; standard; and complex, significant or sensitive) with varying procedural requirements depending on the nature and circumstances of the claim.</p> <p>2.2 separating the investigation and decision making functions for claims in categories 2 and 3.</p> <p>2.3 providing the claimant with the opportunity to consider and comment on the investigator's preliminary view of claims in categories 2 and 3 before a decision is made.</p> <p>2.4 taking a more liberal approach to offering, and accepting requests for, internal review of decisions in categories 2 and 3 if there appears to be a reasonable basis for it.</p> <p>2.5 redrafting CDDA documentation and decision letters in more succinct, everyday language.</p> <p>2.6 providing a regular report on CDDA matters direct to the Commissioner.</p>	<p>The Government accepts this recommendation.</p> <p>By 30 November 2019 the ATO will develop a more comprehensive CDDA manual.</p> <p>2.1-2.4: The new manual will categorise claims to improve claim management and introduces the approach of categorising claims.</p> <p>2.4 and 2.5: Communication with taxpayers will be enhanced to provide greater clarity about decisions and transparency of their review rights to enable better access to review of decisions.</p> <p>The review options will include engaging an independent person from outside the ATO to conduct a review of certain category 3 cases. Where an internal review is conducted by an independent reviewer, the Commissioner will make the final determination.</p> <p>2.6: The Commissioner will receive quarterly reports on compensation matters, so he can provide further guidance to improve the handling of small business claims.</p>
3	<p>That the Commissioner give the ATO's CDDA practitioners guidance about the interpretation of defective administration and detriment in CDDA claims made by small business.</p>	<p>The Government accepts this recommendation. The ATO will provide guidance material to practitioners to increase their understanding of the small business environment in relation to the CDDA scheme.</p>
4	<p>That, if necessary, the ATO amend its service, conduct or performance standards to support the Commissioner's guidance on the interpretation of defective administration.</p>	<p>The Government accepts this recommendation.</p> <p>Small businesses should have confidence that their concerns will be properly considered. The ATO will ensure supporting material for taxpayers and CDDA decision makers reflects the Commissioner's direction. This will provide greater guidance for decision makers and improve transparency, consistency and quality of decision making for taxpayers and small businesses.</p>
5	<p>That the ATO adopt plausibility as the standard of proof in CDDA claims instead of the balance of probabilities.</p>	<p>The Government accepts this recommendation.</p> <p>Applying for compensation should be as easy as possible for small business taxpayers and the burden of demonstrating what has occurred should not be overwhelming. Guidance to ATO decision makers will be updated to better reflect the standard of proof set out in <i>Resource Management Guide 409</i>.</p>

6	That the Review does not support calls for removal of confidentiality agreements from deeds of release.	<p>The Government accepts this recommendation.</p> <p>The use of confidentiality agreements in deeds is common practice in the settlement of disputes. The Government also notes that the secrecy provisions of the Tax Administration Act make it difficult to have an informed public discussion about individual claims for compensation.</p> <p>Concerns about lack of transparency and public awareness of the CDDA scheme can be dealt with by improved communication and de-identified case studies.</p>
7	That the ATO undertake a comprehensive and ongoing communication program to raise awareness about the CDDA Scheme among small businesses, tax professionals and their professional bodies and to assist other organisations and members of the public who want to know about ATO compensation.	<p>The Government accepts this recommendation. The ATO will implement a program of communications to increase awareness and understanding of the CDDA scheme using a range of communication channels including the Small Business Newsroom and Tax Professionals Newsroom. Existing ATO networks including the Small Business Stewardship Group and Tax Professional Stewardship Groups will be used to raise awareness with small business and tax professional industry bodies and professional associations.</p> <p>This communication campaign will complement the range of information and services available on the ATO's website, including a dedicated compensation hotline phone number and email address which provide claimants with direct access to compensation decision makers.</p>
8	That the Government establish a Small Business Compensation Assistance Service open to all small businesses to be administered by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).	<p>The Government accepts this recommendation in part.</p> <p>Access to justice is an important issue for small business operators. It is vital that small businesses are able to resolve disputes quickly, fairly and cost effectively. The Government will establish an assistance function within the ASBFEO to help small businesses navigate the CDDA Scheme as it relates to the ATO.</p> <p>In structuring the scheme, it is important that the operation of the service does not compromise the impartiality of the Ombudsman as a credible and highly regarded voice for the small business sector. Accordingly, the Ombudsman will be empowered to provide clear information about the process, and not formal advice such as a legal professional could provide, as part of this service to small business</p>

		<p>owners. This is consistent with maintaining the independent character of the ASBFEO.</p> <p>This also ensures that the assistance provided through this new service complements the existing advocacy and assistance functions. For example, trends identified through monitoring of the assistance function will allow the Ombudsman to identify key issues which might appropriately fall under the broader advocacy function.</p> <p>This function will work with the ATO to support the communications program outlined at recommendation 7.</p>
<p>9</p>	<p>That the CDDA function be moved from the ATO Corporate business line to the Law Design and Practice Group.</p>	<p>The Government accepts this recommendation in principle.</p> <p>The Government agrees with the principle of openness, accountability, and transparency in decision making and notes that small businesses identified the independence of ATO decision makers as a key concern.</p> <p>To provide taxpayers with a further level of independent assurance, from 30 November 2019, appropriate sensitive and complex matters (category 3) can be escalated to an external reviewer or a senior ATO official at the Second Commissioner or ATO Senior Executive (from an area of the ATO that is not the subject of the complaint and did not manage earlier reviews) to provide guidance and make a decision about the claim.</p> <p>The ATO's General Counsel currently manages the ATO's non-tax related dispute resolution services and is located in the ATO Corporate business line. The ATO has given serious consideration to which part of the organisation has the greatest separation from original decision-makers and the most sensitivity to small business circumstances.</p> <p>As General Counsel officers are located in the ATO Corporate business line and are separate from the ATO's taxation administration, compliance and internal review functions, there is no inference of 'peer review' that might occur if officers were co-located in the Review and Dispute Resolution area.</p> <p>General Counsel officers bring an independent perspective to determining whether defective administration has occurred.</p> <p>General Counsel officers are experienced in resolving disputes and</p>

		<p>managing CDDA claims in accordance with the discretionary nature of the Scheme.</p> <p>The ATO has concluded that General Counsel remains the appropriate area within the ATO to manage compensation claims with the assistance of external reviewers and the ATO Senior Executive.</p>
10	That the Commissioner consider the practicality of including an appropriately worded requirement in the ATO's prescribed procedures specifying that a small business' financial and personal capacity to respond to a review, audit or other compliance process is a factor to be taken into account by ATO officers in discharging their duties.	The Government accepts this recommendation.
11	That, in consultation with the Minister, the Commissioner sets a strategic objective for the ATO's use of the CDDA Scheme and vests the responsibility for developing and implementing an implementation plan to reach the ATO's goal in the Second Commissioner, Law Design and Practice.	<p>The Government accepts this recommendation in principle.</p> <p>The Commissioner will set a strategic objective for the ATO's implementation of the CDDA Scheme. As the CDDA function will remain with General Counsel in accordance with the response to recommendation 9, responsibility for implementing the objectives will be vested with the ATO's Chief Operating Officer (COO).</p>
12	That the implementation of these recommendations be monitored by the Second Commissioner, Law Design and Practice and annual progress reports made to the Minister and the Secretary with a thorough evaluation of outcomes in 2022-23.	<p>The Government accepts this recommendation in principle.</p> <p>The ATO will report on the progress of the implementation of the recommendations to the Minister and the ATO Executive in twelve months. As General Counsel remains responsible for the administration of CDDA matters within the ATO, the COO will work with the Second Commissioner Law Design and Practice to monitor progress.</p>

The ATO's and ASBEFEO's new approach to CDDA claims from small businesses

1. Making Applying for Compensation Easier for Small Business

Under the Government's new approach it will be simple for small business taxpayers to apply for compensation from the ATO and the burden of demonstrating what has occurred will be eased. Through improved communication small businesses will be better aware that the CDDA scheme may be an option for them if they have suffered a loss due to potential defective administration by the ATO.

Under this revised approach the ATO will review and update its guidance materials for applicants to ensure that making a claim is as simple as possible. Further information can be sought from <https://www.ato.gov.au/Forms/Applying-for-compensation/>

ASBFEO will provide an assistance service to ensure that small businesses have confidence in engaging with the ATO CDDA claims process. ASBFEO will expand its information provision through primary communication channels, including its website, telephone contact lines and Case Managers. Through this new service, ASBFEO will provide information for small businesses interested in pursuing a CDDA claim with the ATO, including:

- Details of the ATO's CDDA processes, including timeframes, supporting evidence, and the application process
- Procedures for requesting a review of a decision under the CDDA scheme.

This will help address concerns from some small businesses about a perceived lack of transparency in the CDDA process.

2. Ensuring Fair and Independent Decision Making

The revised approach ensures that small businesses can be confident that their claims will be considered with appropriate independence from those who made decisions impacting on their tax affairs.

Investigations of claims will be conducted by ATO officers who are not involved in management of the tax matters which may have led to the claim. The officers who handle claims will be experienced with resolving disputes.

For sensitive and complex matters decisions will be made either by a fully independent senior ATO official at the SES Band 2 or 3 level from an area of the ATO that is not the subject of the complaint and did not manage the earlier reviews, or by a reviewer external to the ATO.

3. Improved Oversight and Leadership

The Government recognises the significant impact on small business that making a compensation claim can have and will increase the level of oversight and leadership both by the Minister and by senior ATO officers.

The Assistant Treasurer met with the Commissioner to discuss the expectations of the ATO decision makers he has authorised to make CDDA decisions as well as the ATO administration of the CDDA scheme. Following this meeting the ATO has started developing a strategic plan for the ATO's use of the CDDA scheme. This strategic plan will be available on the ATO's website by 1 January 2020.

Relevant Band 2 and 3 senior leaders will meet with the Commissioner on a quarterly basis to provide an update on compensation matters and obtain guidance from the Commissioner on the administration of the CDDA scheme in the ATO.

The Second Commissioner Law Design and Practice will monitor the implementation of these recommendations and provide an initial progress report to the Commissioner, the Assistant Treasurer and the Secretary of the Department of Finance 12 months from the date of this response, which is earlier than the timeframe set out in the report.

4. ATO's Improved Administrative Practices

Streamlined practices will make it easier for small businesses to deal with the ATO in relation to their CDDA claim.

From 30 November 2019 the ATO will update its procedures and instructions to CDDA decision maker to reflect all recommended administrative improvements recommended by the review. This will include an initial categorisation of claims to ensure simple claims are dealt with efficiently and that more complex, significant or

sensitive claims are managed appropriately. For these significant and sensitive claims it will also include an escalation path to independent senior officers at the SES Band 2 and 3 levels, external to General Counsel, or to a reviewer external to the ATO.

The ATO will also simplify its letters and improve the information it provides to applicants about how they can have their decision reviewed.