

LI 2023/27 - Explanatory statement -



Explanatory Statement

Taxation Administration (Remedial Power – Remission of Charges and Penalties) Determination 2023

General outline of instrument

1. This instrument is made under section 370-5 in Schedule 1 to the *Taxation Administration Act 1953* (TAA).
2. The instrument modifies the operation of particular provisions in the TAA which permit the remission of the general interest charge (GIC) (section 8AAG), shortfall interest charge (SIC) (subsection 280-160(1) in Schedule 1), and administrative penalties including the failure to lodge (FTL) penalty (subsection 298-20(1) in Schedule 1).
3. The modifications ensure that the Commissioner of Taxation (Commissioner) can continue the long-standing practice of providing:
 - (a) remissions as an administrative response to a natural disaster or other serious and external adverse event impacting the community,
 - (b) low value or low risk remissions, and
 - (c) agreement-based remissions, where a remission is agreed to prior to the relevant liability arising.
4. The instrument removes any doubt about the Commissioner's power to make remission decisions in relation to *classes of entities*, as well as in circumstances where a charge or penalty *has not yet become due and payable* (but may become due and payable in the future).
5. The modifications support the use of automated processes that remit interest or penalties as soon as those liabilities arise, without requiring a separate request from a taxpayer and a decision from the Australian Taxation Office (ATO) every time a liability arises.
6. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
7. Under subsection 33(3) of the *Acts Interpretation Act 1901* (AI Act), where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. The operation of subsection 33(3) of the AI Act is modified by section 370-15 in Schedule 1 to the TAA in the present context. Section 370-15 enables the Commissioner to repeal determinations made in the exercise of the Commissioner's remedial power under section 370-5. Because section 370-15 relevantly provides an express repeal power for the Commissioner, subsection 33(3) of the AI Act does not apply in relation to the *repeal, rescission or revocation* of a determination made under section 370-5. Subsection 33(3) of the AI Act does, however, apply in relation to the *amendment or variation* of such a determination.

Date of effect

8. Section 370-20 in Schedule 1 to the TAA provides that a determination made under section 370-5 in Schedule 1 to the TAA must not commence before the first day it is no

longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*. Therefore, this determination commences on the first day the determination is no longer liable to be disallowed, or to be taken to have been disallowed.

Background

9. GIC, SIC and administrative penalties (including the FTL penalty) generally apply where entities have failed to meet their taxation obligations or liabilities. The Commissioner has broad discretion to remit these interest and penalty charges under the TAA.
10. It has been a long-standing practice of the Commissioner to remit GIC, SIC and FTL penalties in cases that meet certain criteria (that is, for an affected taxpayer or class of taxpayers) based on a general remission decision that is made before the liabilities arise. Due to the high volume of transactions involved, ATO systems are programmed to implement these general remission decisions each time a relevant liability arises for a taxpayer in the defined class, without requiring a request from each taxpayer and a specific decision by the ATO on each occasion.
11. For example, the Commissioner may decide to remit charges for any taxpayers who are impacted by a natural disaster, or who have a liability to a charge that is of a very low value. Further, early remission decisions (those that occur prior to a charge or penalty becoming due and payable) can also occur for individual entities, such as through agreements to provide ongoing GIC remission under a 50/50 disputed debt arrangement or a concessional payment arrangement.
12. The Commissioner's use of automated remissions for classes of entities is well known in the community, and helps ensure the efficient and fair administration of remission decisions. For example, paragraph 26A of PS LA 2006/8 states that:

[t]he Commissioner may remit amounts because the amount of the interest charge is minimal. For example, the imposition of an amount of SIC or GIC below a small threshold amount will result in remission as part of the ATO's automated processes.
13. General remission decisions by class ensure all entities with the same relevant circumstances are treated in the same way. Automation of those decisions for the entire class of entities in those circumstances ensures this consistency in an efficient way.
14. Given the importance of the remission powers, and the need to ensure efficient and effective administration in a manner where taxpayers are not being put through unnecessary processes, the modifications put beyond doubt that these remissions can be administered using 'early' remission decisions, which are automatically applied to individuals or to all taxpayers in a class of circumstances which justify that remission.

Explanation of instrument

15. This instrument modifies the operation of the relevant remission provisions in the TAA, to put beyond doubt that the Commissioner may make GIC, SIC and FTL penalty remission decisions in relation to either an individual entity or one or more entities in a relevant class, whether or not the charge or penalty has already become due and payable, or may become due and payable in the future.
16. The Commissioner will only be able to remit charges and penalties in relation to a class of entities where they fall within a 'relevant class' as defined in section 4 of the instrument. This ensures that the modification applies in a specific set of circumstances aligned with the Commissioner's long-standing practice of providing low value and low risk remissions, and as an administrative response to adverse events affecting the community.
17. A 'relevant class' is defined as a class of entities:

- (a) that the Commissioner is satisfied has been affected by a natural disaster or other serious and external adverse event,
- (b) with a liability to a charge or penalty that the Commissioner considers is a minor amount, having regard to any relevant matters such as the cost of collecting the liability, costs of compliance for taxpayers, and the need to maintain adequate incentives for the prompt payment of liabilities, or
- (c) with a liability to a charge or penalty that the Commissioner considers it is appropriate to remit to encourage ongoing compliance with taxation laws, having regard to previous compliance history.

Natural disaster or other serious and external adverse event

- 18. During and after disaster events, the ATO seeks to give impacted taxpayers time to recover and help to get their tax affairs back on track when they are ready to commence re-engaging with the tax system. In assisting impacted taxpayers, the ATO considers a range of proactive response measures based on the scale and impact of the particular event. Historically, response measures have included the remission (where appropriate) of penalties and interest charged during the time that taxpayers were affected by the event.
- 19. The term 'serious and external adverse event' is intended to capture an event that is outside of the taxpayer's direct control or influence that has a serious negative impact on the community. An example of such an event might be a cybersecurity incident orchestrated by external actors that significantly affects the operations of the ATO, and impacts the ability of taxpayers to meet their obligations on time.

Minor amounts

- 20. The Commissioner may remit a charge or penalty that they consider to be a *minor* amount. The Commissioner will have regard to any relevant matter in determining when a charge or penalty is a minor amount, including the matters outlined in paragraph (b) of the relevant class definition. For example, the Commissioner may consider an amount to be minor where the cost of collecting the liability would be greater than the amount of the actual liability.

Encouraging ongoing compliance

- 21. The Commissioner may also remit a liability to a charge or penalty where it is appropriate to do so to encourage ongoing compliance with taxation laws. The Commissioner will have regard to a taxpayer's previous compliance history in determining whether to remit a liability in this case.
- 22. This reflects the fact that the ATO aims to make it easy for taxpayers to comply with their tax obligations and seeks to encourage good compliance behaviour. A range of strategies are adopted to achieve that outcome, including the remission of interest and penalties where appropriate. For example, the Commissioner may seek to encourage compliance by remitting a charge or penalty amount for a taxpayer's first failure to lodge or pay on time.

Exercise of the Commissioner's remedial power is appropriate in the circumstances

- 23. The Commissioner considers that the modification of the relevant provisions in the TAA is not inconsistent with the intended purpose or object of those provisions, and is otherwise reasonable. The ATO consulted with the CRP Advisory Panel (which is comprised of private sector specialists, as well as representatives from the ATO and the Department of the Treasury) in reaching this view.

24. In ascertaining the intended purpose or object of these provisions, consideration was given to:
- (a) the Explanatory Memorandum to the Taxation Laws Amendment (No. 5) Bill 1998,
 - (b) the Explanatory Memorandum to the A New Tax System (Tax Administration) Bill 1999,
 - (c) the Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000, and
 - (d) the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 1) 2005.
25. The ability for the Commissioner to remit certain charges and penalties in the circumstances set out in the instrument – that is, by making decisions that apply in relation to more than one entity, and before a liability has arisen – is consistent with the policy underlying the relevant provisions of the TAA.
26. Importantly, remission would still only be able to occur where any statutory criteria set out in relevant provisions in the TAA were met. For example, in the case of SIC, the Commissioner must consider remission to be ‘fair and reasonable’ – see subsection 280-160(1) in Schedule 1 to the TAA. But the modifications put beyond doubt that remission can occur in the most efficient and effective way possible – that is, for bulk remission decisions to be made, including in circumstances where a liability has not yet arisen. This will reduce the administrative burden both for taxpayers and the ATO.
27. Further, the Commissioner considers that the modifications are reasonable because they align with the intended purpose of the provisions, and would also:
- (a) be beneficial for taxpayers, because the Commissioner will be able to continue the practice of providing bulk remissions using existing systems and policy parameters, consistent with long held community expectations and public guidance material,
 - (b) maintain certainty for entities and the Commissioner about the current operation of the ATO’s remission processes, and
 - (c) reduce compliance costs for entities and administration costs for the ATO, especially for taxpayers still meeting the ATO’s low value debt remission criteria; without these, bulk remission taxpayers may need to contact the ATO at least every month seeking remission.

Compliance cost

28. Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature (OIA23-04882).

Budgetary impact

29. The Commissioner has received advice from the Department of the Treasury that the proposed exercise of the CRP would have no budget impact.

Repeal of this instrument

30. This instrument will be repealed at the start of 1 October 2028, which is approximately five years after the expected commencement of this instrument.

Consultation

31. Subsection 17(1) of the *Legislation Act 2003* requires a rule-maker to be satisfied that appropriate and reasonably practicable consultation has been undertaken before they make a legislative instrument.
32. For this instrument, broad public consultation was undertaken between 19 April 2023 and 19 May 2023 inclusive.
33. The draft instrument and draft explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website, and via the 'Open Consultation' page on ato.gov.au. Major tax and superannuation publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members. This ensures advice of the draft is disseminated widely across the tax professional community, and that they are in an informed position to provide comments and feedback.
34. No feedback on this proposal was received through this consultation.
35. In addition, targeted consultation on all prospective CRP candidates is undertaken with the CRP Advisory Panel, a body comprised of private sector specialists and representatives from the ATO and the Department of the Treasury. The Panel supported the exercise of the CRP and provided feedback on the draft determination and explanatory statement.
36. The Board of Taxation was also consulted and supported the exercise of the CRP in this case.

Legislative references

Acts Interpretation Act 1901

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation Act 2003

Taxation Administration Act 1953

Other references

PS LA 2006/8

Statement of compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This instrument is made under section 370-5 in Schedule 1 to the *Taxation Administration Act 1953* (TAA), known as the Commissioner's remedial power. Section 370-5 enables the Commissioner to make a legislative instrument that modifies the operation of a provision of a taxation law, where particular statutory criteria are met.

This instrument modifies the operation of section 8AAG of the TAA, and sections 280-160 and 298-20 in Schedule 1 to the TAA, to put beyond doubt that the Commissioner may decide to remit a relevant charge or penalty owing by *classes of entities*, as well as in circumstances where a charge or penalty *has not yet become due and payable* but may become due and payable in the future.

The modifications ensure that the Commissioner can continue to make appropriate remission decisions (including where taxpayers are affected by a natural disaster or other serious and external event, or the amount owing is of a very low value). The modifications also ensure that remission can arise via automated processes as soon as those liabilities arise, without requiring a separate request and decision to be made in relation to each particular taxpayer when a liability arises.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights because it is wholly beneficial for taxpayers and does not raise any human rights issues.