

# ***PS LA 2011/24 (Withdrawn) - Excess contributions tax - release authority - remission of certain administrative penalties where an individual or superannuation provider does not comply with obligations in relation to a release authority***

⚠ This cover sheet is provided for information only. It does not form part of *PS LA 2011/24 (Withdrawn) - Excess contributions tax - release authority - remission of certain administrative penalties where an individual or superannuation provider does not comply with obligations in relation to a release authority*

⚠ Law Administration Practice Statement PS LA 2011/24 was withdrawn with effect from 1 July 2018. PS LA 2011/24 is no longer required as the provisions dealing with release authorities for excess contributions tax have been repealed and replaced with Division 131 of Schedule 1 to the *Tax Administration Act 1953*. The applicable penalty regime has been simplified and therefore the need for this PS LA, addressing remission of penalties, is no longer considered necessary.

⚠ This document has changed over time. This version was published on *11 October 2018*



# Practice Statement Law Administration

**PS LA 2011/24**

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**FOI status: may be released**

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Law Administration Practice Statement PS LA 2011/24 was withdrawn with effect from 1 July 2018. PS LA 2011/24 is no longer required as the provisions dealing with release authorities for excess contributions tax have been repealed and replaced with [Division 131](#) of Schedule 1 to the *Tax Administration Act 1953*. The applicable penalty regime has been simplified and therefore the need for this PS LA, addressing remission of penalties, is no longer considered necessary.

*This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.*

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**SUBJECT:** Excess contributions tax – release authority – remission of certain administrative penalties where an individual or superannuation provider does not comply with obligations in relation to a release authority

**PURPOSE:** To provide guidelines for the remission of administrative penalties regarding excess contributions tax where:

- an individual does not provide a release authority to a superannuation provider within the specified time
- an individual gives a release authority and the total amount released in accordance with the release authority exceeds the amount required to be released, or
- a superannuation provider does not release the required amount within the specified time.

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## BACKGROUND

1. In this practice statement:
  - all legislative references are to Schedule 1 to the *Taxation Administration Act 1953* (TAA) unless otherwise indicated, and
  - all references to a superannuation provider include a trustee of a superannuation fund, a trustee of an approved deposit fund and a Retirement Savings Account (RSA) provider.
2. From 1 July 2007, an individual may be liable to pay excess contributions tax (ECT) if their concessional<sup>1</sup> or non-concessional<sup>2</sup> contributions to a superannuation plan<sup>3</sup> exceed the caps<sup>4</sup> that are placed on each type of contribution.<sup>5</sup> The Commissioner will give the individual an ECT assessment and a release authority<sup>6</sup> authorising release of an amount equivalent to the amount of the ECT liability.<sup>7</sup> In the case of excess non-concessional contributions, the individual must give their superannuation providers the release authority and must request withdrawal in total of an amount equal to the ECT liability (subject to the total value of the individual's superannuation interests) from their superannuation plans. The withdrawal of money from a superannuation plan via a release authority satisfies a condition of release.<sup>8</sup>
3. Administrative penalties apply where either an individual or a superannuation provider does not comply with their obligations in relation to a release authority. Section 298-20, however, gives the Commissioner the discretion to remit all or a part of each of the administrative penalties imposed.

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<sup>1</sup> Concessional contributions are, broadly, contributions for which deductions have been allowed and which are included in the assessable income of a superannuation provider and taxed at the concessional rate. They would mainly include employer contributions (including contributions made under salary sacrifice) and deductible personal contributions.

<sup>2</sup> Non-concessional contributions are, broadly, contributions made from after tax income and are not included in the assessable income of a superannuation provider. They would mainly include undeducted (or post-tax) personal contributions.

<sup>3</sup> A superannuation plan means a superannuation fund, an approved deposit fund or an RSA – subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).

<sup>4</sup> From 1 July 2009:

- the annual concessional contributions cap for a financial year is \$25,000 (indexed) for those aged under 50, with a transitional cap of \$50,000 applying to those aged 50 and over until 30 June 2012 (section 292-20 of the ITAA 1997 and section 292-20 of the *Income Tax (Transitional Provisions) Act 1997*).
- the annual non-concessional contributions cap for a financial year is \$150,000. Individuals aged under 65 are allowed to bring forward two years of future non-concessional contribution entitlements, giving them a limit of \$450,000 over 3 years (sections 292-20 and 292-85 of the ITAA 1997).

<sup>5</sup> Although caps on non-concessional contributions apply from 10 May 2006.

<sup>6</sup> In this practice statement, a release authority for excess concessional contributions tax is called a *Voluntary release authority for excess contributions tax and statement* (VRA), and a release authority for excess non-concessional contributions tax is called a *Compulsory release authority for excess contributions tax and statement* (CRA). Both the VRA and CRA satisfy requirements under section 388-50 to be approved forms.

<sup>7</sup> Section 292-405 of the ITAA 1997.

<sup>8</sup> Item 112 of Part I in Schedule 1 to the Superannuation Industry (Supervision) Regulations 1994.

## SCOPE

4. This practice statement provides guidelines for the remission of administrative penalties where:
  - an individual does not give a release authority for excess non-concessional contributions tax to a superannuation provider within 21 days after the date of the release authority<sup>9</sup>
  - an individual gave a release authority to the superannuation provider and the total amount released in accordance with the release authority was more than the amount required to be released,<sup>10</sup> or
  - a superannuation provider does not release the required amount within 30 days after receiving the release authority.<sup>11</sup>
5. This practice statement does not deal with:
  - the administrative penalty imposed where a superannuation provider fails to provide a statement of the payment under a release authority to the Commissioner, and a copy of the statement to the individual within 30 days<sup>12</sup>, or
  - the imposition or remission of the general interest charge (GIC)<sup>13</sup>, which is independent of the penalties in relation to a release authority.

## STATEMENT

6. Where an individual or superannuation provider is liable to a penalty for failing to comply with their obligations in relation to a release authority, the Commissioner must consider whether it is appropriate to remit all or a part of the penalty. Therefore, a remission decision must be made before a penalty notice is issued.
7. The facts of each case determine whether the Commissioner should exercise the discretion to remit the penalty. For this reason, the statements, and levels of penalty remission reflected in the examples within this practice statement, should be used as a guide only.
8. In determining whether it is appropriate to exercise the discretion, the Commissioner will:
  - consider information provided by the individual or superannuation provider
  - consider evidence of the individual's or superannuation provider's attempt to comply with their obligations in relation to a release authority
  - consider facts which are relevant to the appropriateness of the penalty in the circumstances
  - act in accordance with the principles of the compliance model and the Taxpayers' charter, and
  - apply the good decision-making model.<sup>14</sup>

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<sup>9</sup> The time period is specified by subsection 292-410(2) of the ITAA 1997 and the administrative penalty for failing to comply with this subsection is imposed under section 288-90 of Schedule 1 to the TAA.

<sup>10</sup> The amount is specified by subsection 292-415(1) of the ITAA 1997 and the administrative penalty for failing to comply with this subsection is imposed under section 288-100 of Schedule 1 to the TAA.

<sup>11</sup> The time period is specified by subsection 292-415(1) of the ITAA 1997 and the administrative penalty is imposed under section 288-95 of Schedule 1 to the TAA.

<sup>12</sup> The time period is specified by subsection 390-65(2) and the administrative penalty for failing to comply with this subsection is imposed under section 286-75 of Schedule 1 to the TAA.

<sup>13</sup> An individual is liable to pay the GIC under section 292-390 of the ITAA 1997 where they do not pay the ECT liability by the due date.

9. A relevant consideration in determining whether to exercise the Commissioner's discretion to remit the penalty will be the level at which the individual or superannuation provider has attempted to comply with their obligations in relation to a release authority.
10. If an individual or superannuation provider has made:
- a genuine attempt to comply – the Commissioner may consider it appropriate for any relevant penalties to be remitted in full
  - a moderate attempt to comply – the Commissioner may consider it appropriate for any relevant penalties to be partially remitted, or
  - no attempt to satisfy their obligations – the Commissioner may consider it is not appropriate to exercise the discretion to remit the penalty at all.
11. Generally, an individual or superannuation provider is considered to have made:
- a genuine attempt to comply – if they took action to understand their obligations and, once they became aware of the obligations, they immediately took corrective action
  - a moderate attempt to comply – if they took corrective action once they became aware of their obligations, their action fell short of making 'a genuine attempt to comply', but they were not deliberately delaying compliance, or
  - no attempt to comply – if they became aware of their obligations but failed to take action to comply or deliberately delayed complying with their obligations.
12. Where an individual or superannuation provider took a course of action, but those actions were irrelevant or had no effect in meeting their obligations, they will be considered to have made no attempt to comply.
13. Where an individual or superannuation provider's failure to meet their obligations is attributable to circumstances and factors beyond their control, the Commissioner will consider those factors and the extent to which compliance was affected.
14. The following table provides a guide on how the Commissioner may decide on the level of remission:

	<b>Level of attempt to comply</b>	<b>Level of remission</b>	<b>Percentage of remission</b>
1	Genuine attempt to comply <ul style="list-style-type: none"> <li>▪ An individual or superannuation provider took action to understand their obligations, and immediately took corrective action once becoming aware of them.</li> </ul>	Full remission	100%
2	Moderate attempt to comply <ul style="list-style-type: none"> <li>▪ An individual or superannuation provider took corrective action once becoming aware of their obligations, their actions fell short of making a genuine attempt to comply, but they</li> </ul>	Partial remission	75%, 50% or 25% – dependent on additional factors (examples are

<sup>14</sup> Under the good decision-making model, decisions must be legal, ethical, equitable, overt, sensible, timely and in accordance with the principles of natural justice.

	were not deliberately delaying compliance.		listed at paragraph 15 of this practice statement)
3	No attempt to comply <ul style="list-style-type: none"> <li>▪ An individual or superannuation provider became aware of their obligations but failed to take action to comply, or deliberately delayed complying with them.</li> </ul>	No remission	0%

15. Where an individual or superannuation provider has made a moderate attempt to comply, the Commissioner must consider additional factors in determining the appropriate level of partial penalty remission for a particular case. Examples of additional factors include (but are not limited to):
- the extent to which the individual or superannuation provider failed to fulfil their obligations in relation to a release authority
  - the individual's or superannuation provider's experience regarding their obligations in relation to a release authority, and
  - the compliance history of the individual or superannuation provider subject to penalty.
16. Generally, the Commissioner may consider it appropriate to remit 75% of the penalty if the extent to which the individual or superannuation provider fails to comply with their obligations is considered minor, plus they have no prior experience with the obligations and they otherwise have a good compliance history.<sup>15</sup> If all those relevant factors do not exist, it may be more appropriate to partially remit the penalty by a lower percentage such as 50% or 25%, depending upon the particular circumstances.
17. This practice statement has examples of three levels of partial remissions, (75%, 50% and 25%) where an individual or superannuation provider has made a moderate attempt to comply. However, it does not in any way restrict the Commissioner from varying, up or down, those suggested percentages due to any other relevant circumstances that may exist for the individual or superannuation provider.
18. In situations where an individual or superannuation provider may be liable for more than one administrative penalty, each penalty and remission decision is to be considered individually. However, the Commissioner must consider the totality principle to ensure that the cumulative penalty imposed on an individual or superannuation provider is appropriate having regard to the circumstances of the case. This may result in further penalty remission if the cumulative penalty is considered otherwise inappropriate.
19. If an administrative penalty is applied, the Commissioner must issue a written notice to the individual or superannuation provider of their liability to pay the penalty and the reasons why they are liable. This notice must advise the amount of the liability that remains after any remission and the reason for the decision not to remit, or to remit only a part of the penalty. When a penalty is remitted in full, there is no requirement for the Commissioner to inform the individual or superannuation provider of the decision.<sup>16</sup> However, for the

<sup>15</sup> A good compliance history is one where all obligations including registration, lodgment, reporting and payment of debts have generally been met on time.

<sup>16</sup> Sections 298-10 and 298-20.

purpose of encouraging future compliance and in accordance with the Taxpayers' Charter, the Commissioner will give written notice to advise the individual or superannuation provider of the full remission and reasons for the decision.

## **EXPLANATION**

### **Policy intent of the administrative penalty**

#### ***Why must excess non-concessional contributions tax be withdrawn?***

20. From 1 July 2007, as part of the *Superannuation Simplification* measures, age-based deduction limits and reasonable benefit limits were abolished. Payment of superannuation benefits to a person aged 60 and over, where those benefits have been subject to tax in the fund, are generally tax free. These changes, in conjunction with the continuing tax exemption provided for income from superannuation assets supporting a pension, make superannuation an attractive vehicle for retaining assets to minimise tax. An incentive exists for people to transfer income-producing assets currently held outside superannuation, into the concessional tax superannuation system.
21. To limit the amount of money individuals could put into the concessional tax superannuation environment each year, the excess contributions tax regime was introduced. This imposed a new tax on contributions made by an individual above set annual caps.<sup>17</sup> This is to ensure that the amount of concessional tax superannuation benefits that a person receives results from superannuation contributions that have been made gradually over the course of the person's life.
22. Where the contributions made for an individual to a superannuation plan exceed the relevant caps, the Commissioner will give the individual an ECT assessment and a release authority equivalent to the amount of the ECT liability. In the case of excess non-concessional contributions tax, the individual must withdraw an amount equal to the ECT liability from their superannuation plan.
23. Allowing excess non-concessional contributions tax to remain in the superannuation system would provide individuals with a benefit to which they are not entitled. For this reason, penalties are imposed on an individual when they do not provide a release authority to a superannuation provider within 21 days.<sup>18</sup> There are also penalties imposed on the superannuation provider when they do not release amounts within 30 days after receiving the release authority, or do not provide a report of the released amount to the Commissioner and the individual within 30 days of the payment.<sup>19</sup> The removal of excess non-concessional contributions tax from an individual's superannuation plans is a key integrity control for the ECT regime.

#### ***Why does an amount equal to ECT liability need to be released?***

24. Generally, the superannuation preservation rules restrict the ability of individuals to withdraw money from superannuation until they satisfy a condition of release, such as, when they have attained preservation age and retired. However, when an ECT liability arises, the individual will be able to, and in some cases must, withdraw an amount equal to the ECT liability from

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<sup>17</sup> Paragraph 1.12 of the Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006.

<sup>18</sup> Section 288-90.

<sup>19</sup> Sections 288-95 and 390-65.

their superannuation plans. The withdrawal of an amount from a superannuation plan under a release authority satisfies a condition of release as prescribed in Item 112 of Part 1 in Schedule 1 to the Superannuation Industry (Supervision) Regulations 1994.

25. However, where an individual accesses more than the amount required to be paid under a release authority, to the extent that the amount released is greater than the ECT liability, the amount does not satisfy the cashing restrictions in relation to the condition of release. An administrative penalty of 20 penalty units<sup>20</sup> will be imposed on the individual under section 288-100. In addition, the taxing of the amount released in excess of the ECT liability at the individual's marginal rate is intended to ensure that only an amount which satisfies the cashing restrictions in relation to the condition of release should be released from the individual's superannuation plans.

### ***Why is an administrative penalty imposed for failing to comply?***

26. Without the imposition of administrative penalties for failing to comply with obligations in relation to a release authority, an amount equal to the excess non-concessional contributions tax might not be withdrawn promptly from the superannuation system, or an amount greater than the amount of the excess contributions tax might be removed from a superannuation plan resulting in early release issues. The imposition of administrative penalties, therefore, is to encourage individuals and superannuation providers to voluntarily comply with their obligations in relation to a release authority.

### **Penalty for failing to comply with obligations in relation to a release authority**

#### ***An individual receives a Voluntary release authority for excess contributions tax and statement (VRA<sup>21</sup>) for excess concessional contributions tax liability***

27. If an individual is liable for excess concessional contributions tax, they:
- can choose to pay the liability from their personal resources, or
  - may withdraw money from their superannuation plans by giving a VRA to one, or more, superannuation providers that hold their superannuation interests (other than a defined benefit interest) within 90 days after the date of the release authority.<sup>22</sup>

#### ***An individual receives a Compulsory release authority for excess contributions tax and statement (CRA<sup>23</sup>) for excess non-concessional contributions tax liability***

28. If an individual is liable for excess non-concessional contributions tax, they must only withdraw an amount equal to the liability from their superannuation plans. The individual must give the CRA to one or more superannuation providers that hold their superannuation interests (other than a defined benefit interest), within 21 days after the date of the release authority, and must request payment of the full amount taking account of all requests.<sup>24</sup> If they do not send the release authority to a superannuation provider within 21 days

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<sup>20</sup> Refer to section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

<sup>21</sup> An individual uses the VRA to authorise their superannuation providers to release an amount equal to the amount of excess concessional contributions tax they have been assessed for.

<sup>22</sup> Subsection 292-410(1) of the ITAA 1997.

<sup>23</sup> An individual uses the CRA to authorise their superannuation providers to release an amount equal to the amount of excess non-concessional contributions tax they have been assessed for.

<sup>24</sup> Subsection 292-410(2) of the ITAA 1997.

after the date of the release authority, they are liable for an administrative penalty of 20 penalty units.<sup>25</sup>

29. In some circumstances, the Commissioner may give a release authority directly to the superannuation provider.<sup>26</sup> For example, if an individual does not give a release authority for excess non-concessional contributions tax to a superannuation provider within 90 days after the date of the release authority, or the total of the amount paid by superannuation providers falls short of the amount stated in the release authority. In this practice statement, the release authority that the Commissioner may give directly to the superannuation provider is called an *Authority to release excess contributions tax and statement* (ARECT).<sup>27</sup>

### ***An individual requests a total amount more than the amount required to be released***

30. If an individual gives a release authority to one or more superannuation providers, and the total amount released by the superannuation providers in accordance with the release authorities exceeds the ECT amount required to be released, the individual is liable to an administrative penalty of 20 penalty units.<sup>28</sup>
31. In addition, the amount released which is in excess of the amount required to be released will be treated as an unauthorised release of superannuation and must be included in the individual's assessable income and subject to income tax at the individual's marginal rate.<sup>29</sup> A penalty for making a false or misleading statement may also apply where an individual has failed to include that unauthorised amount which has been accessed early from the superannuation plan in their income tax return.<sup>30</sup>

### ***Superannuation provider receives a release authority***

#### *Releasing amount on receipt of a release authority*

32. A superannuation provider that receives a release authority must release as much of the specified amount stated in the release authority as is requested, within 30 days after receiving the release authority, subject to the total value of the individual's superannuation interests held in the fund (other than a defined benefit interest). A superannuation provider that fails to release the correct amount on time is liable to an administrative penalty of 20 penalty units.<sup>31</sup>
33. A release authority expires after 90 days. A superannuation provider therefore must not release the money if a release authority is given to the superannuation provider more than 90 days after its date of issue. If the release authority is for non-concessional contributions tax, the Commissioner may replace the expired release authority by giving an ARECT to the superannuation provider who must release the amount as directed.<sup>32</sup>

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<sup>25</sup> Section 288-90.

<sup>26</sup> Subsections 292-410(3) and 292-410(4) of the ITAA 1997.

<sup>27</sup> An ARECT satisfies requirements under section 388-50 to be an approved form.

<sup>28</sup> Section 288-100.

<sup>29</sup> Subsection 304-15(4) of the ITAA 1997.

<sup>30</sup> Section 284-75.

<sup>31</sup> Subsection 288-95(1).

<sup>32</sup> Subsections 292-410(3) and 292-410(4) of the ITAA 1997.

*Providing a release authority to the Commissioner and a copy to the individual*

34. Pursuant to section 390-65, when a superannuation provider releases an amount under a release authority, they must complete the statement section on the release authority and return it to the Australian Taxation Office (ATO) within 30 days of the payment being made. A superannuation provider who fails to do this is liable to a penalty for failing to lodge documents on time.<sup>33</sup> Any decision to remit this penalty should be considered on a case by case basis in accordance with the principles set out in PS LA 2011/19 – Administration of penalties for failing to lodge documents on time. A superannuation provider is also required to give the individual a copy of the release authority sent to them within 30 days after releasing the requested amount or they will be liable to an administrative penalty.<sup>34</sup>
35. Section 38A of the *Superannuation Industry (Supervision) Act 1993* (SISA) includes Division 390 of Schedule 1 to the TAA as a regulatory provision. As such, conduct giving rise to an administrative penalty under Division 390 of Schedule 1 to the TAA is a contravention under SISA.<sup>35</sup> For a self-managed superannuation fund, this contravention will be taken into consideration by the Commissioner in making a decision whether to allow the fund to maintain its complying status and/or to disqualify a trustee of the fund.<sup>36</sup> However, the imposition of the penalty under Division 390 of Schedule 1 to the TAA does not automatically result in the issue of a notice of non-compliance<sup>37</sup> and/or a disqualification of a fund's trustee.<sup>38</sup>
36. If a superannuation provider makes a false or misleading statement in a material particular, for example, if they record the amount released incorrectly, in a release authority to the Commissioner, or in a copy of the release authority to the individual, an administrative penalty for making a false or misleading statement may be imposed on the superannuation provider.<sup>39</sup>

**Guidelines for the remission of penalties in relation to a release authority**

37. The Commissioner recognises that some individuals or superannuation providers may not be familiar with their obligations in relation to a release authority. Therefore, when a release authority is issued to an individual, the Commissioner also attaches instructions and advice on:
- what the individual or superannuation provider is required to do, and
  - where to seek additional assistance to comply with their obligations.
- The Commissioner also advises that penalties may apply if they fail to comply.

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<sup>33</sup> Subsection 286-75(1).

<sup>34</sup> Subsection 286-75(2A).

<sup>35</sup> Refer to paragraph 39(1)(c) and subsections 39(1A) and 39(1B) of the SISA.

<sup>36</sup> Refer to paragraph 42A(5)(b) and section 126A of the SISA.

<sup>37</sup> For factors the Commissioner will consider in deciding whether to give an SMSF a notice of non-compliance, refer to Law Administration Practice Statement PS LA 2006/19 Self-managed superannuation funds – notice of non-compliance.

<sup>38</sup> For circumstances in which the Commissioner will consider disqualifying an individual and thereby prohibit them from acting as a trustee of an SMSF, refer to Law Administration Practice Statement PS LA 2006/17 Self-managed superannuation funds – disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund.

<sup>39</sup> If the false or misleading statement was made on or after 4 June 2010, the penalty will range from 20 to 60 penalty units per statement (subsection 284-75(1) and 284-75(4)). If the false or misleading statement was made in a period from 1 July 2007 to 3 June 2010 and the superannuation provider is a trustee of a self-managed superannuation fund, the penalty is 20 penalty units per statement (former section 288-85).

38. Where an individual or superannuation provider fails to comply with their obligations in relation to a release authority, the law imposes an administrative penalty at the maximum amount specified. The penalty is not imposed by the exercise of any power of the Commissioner but automatically as a consequence of an incorrect action or inaction of an individual or superannuation provider.
39. Section 298-20 gives the Commissioner discretion to remit all or a part of each of the administrative penalties imposed. In exercising the discretion, the Commissioner has regard to the purpose of the penalty regime which is to encourage entities to make a genuine attempt to comply with their tax obligations.
40. In order to adopt a fair and reasonable approach when considering the appropriate remission of a penalty, the Commissioner ensures that an entity that has genuinely tried to meet their obligations will receive the highest level of penalty remission. Those who are wilfully non-compliant will generally receive no penalty remission.
41. In determining to what extent the penalty should be remitted, the individual circumstances of a case must be considered. A relevant matter to take into account is the level of attempt made by the individual or superannuation provider in complying with their obligations.
42. In determining the level of attempt, the Commissioner considers the evidence an individual or superannuation provider can give as to the action they took to understand and comply with their obligations. Generally, the higher level of penalty remission will occur when:
- there were actions taken by the individual or superannuation provider to understand and comply with their obligations, and
  - those actions were taken in a timely manner.
43. Examples of actions taken by an individual or superannuation provider include (but are not limited to):
- making enquiries to a qualified tax practitioner or the ATO, or consulting ATO publications to understand their obligations, and/or
  - establishing and implementing appropriate business processes to deal with their obligations, for example, documenting procedures and processes and recording the training they provided to staff to deal with the release authorities.
44. Where an individual or superannuation provider's failure to meet their obligations is attributable to circumstances and factors beyond their control, the Commissioner will consider those factors and the extent to which compliance was affected. Generally, the more promptly they took steps to address the issue, the higher the level of attempt to comply. Examples of these circumstances include (but are not limited to):
- natural disasters, such as flood, bushfire, or earthquake
  - when the release authority is not received within time because the individual or superannuation provider was out of the country or hospitalised, or
  - a calculation error or delay in taking corrective action by a third party.

45. The Commissioner will consider additional factors when determining an appropriate level of partial penalty remission for a particular case. Examples of additional factors to be considered include (but are not limited to):
- the extent to which the individual or superannuation provider fails to fulfil their obligations in relation to a release authority
  - the individual's or superannuation provider's experience with their obligations in relation to a release authority, and
  - the individual's or superannuation provider's compliance history.
46. Generally:
- the extent of failure is less where the individual or superannuation provider failed to comply with their obligations by the due date but shortly after took action to comply without any contact from, or action taken by, the Commissioner; or the amount released which is greater than the amount required to be released is insignificant having regard to the circumstances of the case
  - an individual or superannuation provider who has not had any dealing with a release authority should receive a higher level of penalty remission than the one who has had prior experience with the obligations in relation to a release authority, and
  - a good compliance history<sup>40</sup> is an indicator of an individual's or superannuation provider's intent to comply with their taxation obligations as opposed to those entities whose compliance history reveals a pattern of non-compliance with their obligations. Therefore, in the absence of any evidence or information that helps form a view about the individual or superannuation provider's compliance efforts with a release authority, the Commissioner will consider their compliance history. Generally, one who has a history of good compliance would receive a higher level of penalty remission than one with a history of not complying with tax obligations.
47. It is acknowledged that from time to time mistakes may be made by entities attempting to comply with their obligations. If an entity has made an honest mistake or an inadvertent error, this will be taken into account by the Commissioner when determining the appropriate amount of penalty remission.
48. Examples of honest mistakes or inadvertent errors include (but are not limited to):
- a miscalculation or transposition error on the release authorities when they are sent to more than one superannuation provider, or
  - an amount nominated to be released from an individual's account is less than the amount they anticipated their interest to be at the date they give a CRA to a superannuation provider. The time it takes them to realise this and give the CRA to another superannuation provider to withdraw the remainder of the ECT liability causes them to exceed the 21 day time period.

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<sup>40</sup> A good compliance history is one where all obligations including registration, lodgment, reporting and payment of debts have generally been met on time.

## **Multiple penalties**

49. Depending on the facts of each case, an individual or superannuation provider may be liable for more than one administrative penalty. For example:
- an individual who exceeds their non-concessional cap could be liable for a penalty for not giving a release authority to their superannuation providers within 21 days, and a penalty for requesting release of more than the amount of the ECT liability, or
  - a superannuation provider could be liable for a penalty for failing to release the required amount within 30 days after receiving a release authority, and a penalty for failing to lodge a statement of the payment under a release authority on time.
50. In situations where an individual or superannuation provider is liable for more than one administrative penalty, each penalty and remission decision is to be considered individually. In these cases, where several penalties apply, the Commissioner considers whether the cumulative penalty is appropriate for the particular individual or superannuation provider, taking account of the extent to which individual penalties arise from circumstances which are connected, and of the extent to which individual penalties arise from a single course of conduct, or from a single error.

## **Genuine attempt to comply – Full penalty remission (100%)**

51. If a penalty applies to an individual or superannuation provider but they have made a genuine attempt to comply with their obligations in relation to a release authority, the penalty will be remitted in full.
52. Generally, an individual or superannuation provider is considered to have made a genuine attempt to comply if:
- they took action to understand their obligations and once they became or were made aware of their obligations, they immediately took corrective action, and/or
  - there were particular circumstances beyond the individual's or superannuation provider's control that affected their ability to comply with their obligations. However, once they became aware of these matters they took steps to immediately address the issues.

## **Moderate attempt to comply – Partial penalty remission (75%, 50% or 25%)**

53. If the facts show that an individual or superannuation provider has made a moderate attempt to comply with their obligations in relation to a release authority, the penalty will be partially remitted.
54. Generally, an individual or superannuation provider is considered to have made a moderate attempt to comply if:
- they took corrective action once they became aware of their obligations
  - their actions fell short of making 'a genuine attempt to comply', but they were not deliberately delaying compliance, and/or
  - there were particular circumstances beyond the individual's or superannuation provider's control that affected their ability to comply with their obligations. After they became aware of these matters they took steps to address the issues, however, they did not do so immediately.

55. In this case, the Commissioner will consider the following factors in determining the appropriate amount of penalty to be partially remitted:
- the extent to which the individual or superannuation provider fails to fulfil their obligations in relation to a release authority
  - the individual's or superannuation provider's experience with their obligations in relation to a release authority, and
  - the compliance history of the individual or superannuation provider subject to the penalty.
56. Generally, the Commissioner may consider it appropriate to remit 75% of the penalty if the extent to which the individual or superannuation provider fails to comply with their obligations is considered minor, plus they have no prior experience with these obligations and they otherwise have a good compliance history. If all these factors do not exist, it may be more appropriate to partially remit the penalty by a lower percentage such as 50% or 25% depending on the particular circumstances.
57. This practice statement has examples of three levels of partial remission, 75%, 50% and 25%, where an individual or superannuation provider has made a moderate attempt to comply. However, it does not in any way restrict the Commissioner from varying, up or down, those suggested percentages due to any other relevant circumstances that may exist for the individual or superannuation provider.

**No attempt to comply – No penalty remission (0%)**

58. If an individual or superannuation provider made no attempt to comply with obligations of which they were aware in relation to a release authority, then the Commissioner may consider it would be appropriate for no part of the penalty to be remitted.
59. A finding that an individual or superannuation provider made no attempt to comply may be determined on the basis of direct evidence (such as an admission), or may be inferred from the surrounding circumstances. For example, they promised to take corrective action but failed to do so.
60. Generally, an individual or superannuation provider is considered to have made no attempt to comply if they became aware of their obligations, for example, they have had prior experience with a release authority in at least one financial year, but:
- they failed to take action to comply, or
  - they deliberately delayed complying with their obligations.
61. Where an individual or superannuation provider undertook some actions, but those actions were irrelevant, or had no effect in meeting their obligations, they will be considered to have made no attempt to comply. For example, paying an ECT assessment by the due date is irrelevant as payment of the ECT assessment is a separate obligation in its own right. It has no effect on an individual complying with their obligation in relation to a release authority.

## Administration of penalty

62. Under section 298-10, where an administrative penalty applies to either an individual or a superannuation provider for failing to comply with their obligations in relation to a release authority, the Commissioner is required to give written notice to the individual or superannuation provider of their liability to pay the penalty, and the reasons why they are liable for the penalty.
63. Subsection 298-20(2) requires the Commissioner to give written notice of the decision, and reasons, where a decision is made not to remit or to remit only part of the penalty. The Commissioner is not required to give reasons if he decides to remit all of the penalty.<sup>41</sup> However, for the purpose of encouraging future compliance and in accordance with the Taxpayers' Charter commitment to explain our decisions, the Commissioner will give written notice to advise the individual or superannuation provider of the full remission and reasons for the decision.
64. The notice will contain an explanation of:
- why the individual or superannuation provider is liable to the penalty
  - the amount of the penalty imposed by law
  - the Commissioner's discretion to remit the penalty
  - the evidence relied on to make the remission decision
  - the amount of remission, if any, and
  - the amount of penalty payable, if any, after remission.
65. The amount of penalty notified should be the amount remaining after any remission of the penalty. This advice may be included in any other notice. Under section 298-15, the due date for payment of the penalty must be specified in the notice, being at least 14 days after the notice is given to the individual or superannuation provider.
66. Where a penalty remains unpaid after it is due, the individual or superannuation provider will be liable to pay the GIC on the outstanding amount.<sup>42</sup>
67. Under subsection 298-20(3), if:
- the Commissioner refuses to any extent to remit an amount of penalty
  - the amount of penalty payable after the refusal is more than 2 penalty units, and
  - the individual or superannuation provider is dissatisfied with the decision
- they may object against the decision in the manner set out in Part IVC of the TAA.

## Examples

68. The following examples demonstrate how the Commissioner may exercise his discretion to remit penalties in various circumstances. The considerations set out in the examples are not exhaustive and are not intended to limit the Commissioner in his discretion to remit penalties.

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<sup>41</sup> Section 298-10.

<sup>42</sup> Section 298-25.

**Individual failed to provide a CRA to a superannuation provider within 21 days after the date of the release authority**

*Example 1 – Genuine attempt to comply – Full penalty remission (100%)*

69. *An individual was on an overseas trip when a CRA was issued to their home address in respect of an ECT liability. The CRA was required to be given to a superannuation provider within 21 days from the date of its issue. Within a week after coming back to the country, the individual gave the CRA to their superannuation provider.*
70. *Since the CRA was given to the superannuation provider more than 21 days after its issue date, under section 288-90 the individual is liable for an administrative penalty of 20 penalty units.*
71. *In this case, the Commissioner may consider the individual has made a genuine attempt to provide a release authority to a superannuation provider within the specified time. Their action of sending the CRA to a superannuation provider within days of being back in the country indicates their genuine attempt to comply with requirements in relation to the CRA.*
72. *In these circumstances, it would be appropriate for the Commissioner to determine that the penalty be remitted in full (as per the table in paragraph 14 of this practice statement).*

*Example 2 – Genuine attempt to comply – Full penalty remission (100%)*

73. *An individual used their own resources to pay an ECT liability promptly when they received an ECT assessment. A week later they received a CRA in respect of the ECT liability. The individual thought that because they already paid the ECT liability, they satisfied their obligations and thus did not take any further action. In a meeting with their tax agent four weeks after the issue date of the CRA, the individual spoke about the release authority and realised that when paying the ECT liability, they were required to withdraw money from the superannuation plan otherwise they would face a penalty. Following the meeting with their tax agent, they immediately sent the CRA to their superannuation provider to withdraw the correct amount from their superannuation plan.*
74. *Since the release authority was not given to the superannuation provider within 21 days from its issue date, under section 288-90 the individual is liable for an administrative penalty of 20 penalty units.*
75. *In this case, the Commissioner may consider the individual has made a genuine attempt to provide a release authority to a superannuation provider within the specified time because they sought advice from their tax agent to understand their obligations and once they were aware of their obligations, they immediately took corrective action.*
76. *In these circumstances, it would be appropriate for the Commissioner to determine that the penalty be remitted in full (as per the table in paragraph 14 of this practice statement).*

*Example 3 – Moderate attempt to comply – Partial penalty remission (75%, 50% or 25%)*

77. *An individual received a CRA in respect of an ECT liability and was required to give the CRA to a superannuation provider within 21 days from its issue date. Due to their forgetfulness, the individual sent the CRA to their superannuation provider just before the 90th day<sup>43</sup> after its issue date.*
78. *Since the release authority was not given to the superannuation provider within 21 days from its issue date, under section 288-90 the individual is liable for an administrative penalty of 20 penalty units.*
79. *In this case, it would not be appropriate for the Commissioner to determine that the individual has made a genuine attempt to provide a release authority to a superannuation provider within the specified time. However, they took corrective action by sending the release authority to their superannuation provider once they recalled their obligations.*
80. *In these circumstances, it would be appropriate for the Commissioner to determine that the individual has made a moderate attempt to comply and the penalty be partially remitted (as per the table in paragraph 14 of this practice statement).*
81. *In considering additional factors:*
- *the individual sent the CRA before the 90th day thus the superannuation provider received a valid CRA. No action was required to be taken by the Commissioner.*
  - *this is the first time they received a CRA, and*
  - *other dealings with the ATO indicate they have a good compliance history.*
82. *In these circumstances, the Commissioner may consider it appropriate for the penalty to be partially remitted by 75%. The penalty after remission therefore would be 5 penalty units.*
83. *If the facts had shown that the individual had previous experience with these obligations in relation to a CRA, or they do not have a good compliance history, the Commissioner may consider it is more appropriate to partially remit the penalty by 50%. Therefore the penalty after remission would be 10 penalty units.*
84. *Alternatively, if the facts had shown that they sent the CRA to a superannuation provider after it expired, that is, more than 90 days after its issue date, and the Commissioner had to send an ARECT to the superannuation provider to request the money be released, the extent to which they failed their obligations would not be considered minor. It would be appropriate for the Commissioner to determine that the penalty be partially remitted by 25%. Therefore the penalty after remission would be 15 penalty units.*
85. *Please note: remission percentages of 75%, 50% or 25% are used as a guide only. They can be varied, up or down, if the facts and circumstances of the case are different to this example.*

*Example 4 – No attempt to comply – No penalty remission (0%)*

86. *An individual received a CRA in respect of an ECT liability for the current financial year. The individual initially believed the ECT assessment was*

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<sup>43</sup> A release authority is still valid up to 90 days from its issue date.

*incorrect because having received a CRA for a previous financial year, they had sought financial advice and took action to avoid exceeding the contributions cap for the current financial year. However the action taken did not stop the individual exceeding the non-concessional contribution cap. Once the individual discovered the ECT assessment was correct, they were so unhappy about the incorrect financial advice they had received, they ignored the CRA and did not send it to a superannuation provider.*

87. *Since the individual did not send the release authority to the superannuation provider within 21 days from its issue date, under section 288-90 they are liable for an administrative penalty of 20 penalty units.*
88. *In this case, the Commissioner may consider the individual has made no attempt to provide a release authority to a superannuation provider within the specified time because they had prior experience with a CRA in a previous financial year and consciously took no action to comply with their obligations in relation to the CRA for this financial year.*
89. *In these circumstances it would be appropriate for the Commissioner to determine that no part of the penalty be remitted (as per the table in paragraph 14 of this practice statement).*

***Individual gave a release authority and the total amount released exceeded the amount required to be released***

90. *When investigating why a higher amount than authorised under a release authority was removed, the Commissioner will carefully consider the explanation provided by the individual about why and how this situation occurred.*

***Example 5 – Genuine attempt to comply – Full penalty remission (100%)***

91. *An individual received a CRA in respect of an ECT liability of \$2,215. The individual sent a CRA to one superannuation provider to withdraw \$2,000 and sent a CRA to a second provider to withdraw \$251 (instead of \$215). The incorrect amount nominated in the release authority to the second superannuation provider resulted in the cumulative amount released by two superannuation providers exceeding the amount required by \$36.*
92. *Since the total amount released exceeds the amount required to be released, under section 288-100 the individual is liable for an administrative penalty of 20 penalty units.*
93. *In this case, the Commissioner may consider the individual has made a genuine attempt to request an amount equal to their ECT liability to be released under a CRA. They sent a release authority to more than one superannuation provider and the Commissioner accepts the individual's explanation that they made a transposition error of an insignificant amount.*
94. *In these circumstances it would be appropriate for the Commissioner to determine that the penalty be remitted in full (as per the table in paragraph 14 of this practice statement). However, the individual needs to include the amount released in excess of the amount required to be released, which is \$36, in their assessable income for the financial year.*

***Example 6 – Moderate attempt to comply – Partial penalty remission (75%, 50% or 25%)***

95. *An individual received a CRA in respect of an ECT liability of \$8,145. The individual sent the CRA to one superannuation provider to withdraw \$145 and*

*planned to send the CRA to another provider to withdraw the balance of \$8,000. However, the individual failed to specify the nominated amount in the release authority to the second superannuation provider. As a result, the second superannuation provider released the full excess non-concessional contributions tax amount of \$8,145. The cumulative amount released by the two superannuation providers therefore exceeded the amount required to be released by \$145.*

96. *Since the total amount released exceeds the amount required to be released, under section 288-100 the individual is liable for an administrative penalty of 20 penalty units.*
97. *In this case:*
- *the individual admitted they were aware that they failed to nominate a reduced amount to be released by the second superannuation provider after the release authority was sent but they did not inform the superannuation provider about it,*
  - *however, they did not deliberately withdraw an amount greater than the amount required to be released.*
98. *In these circumstances, it would be appropriate for the Commissioner to determine that the individual has made a moderate attempt to comply, and the penalty be partially remitted (as per the table in paragraph 14 of this practice statement).*
99. *Regarding the circumstances of the case:*
- *the amount released greater than the amount required to be released is not considered significant*
  - *this is the first time the individual received a CRA, and*
  - *other dealings with the ATO indicate they have a good compliance history.*
100. *In this case, it would be appropriate for the Commissioner to determine that the penalty be partially remitted by 75%. Therefore the penalty after remission would be 5 penalty units.*
101. *If the facts had shown that the amount released (greater than the amount required to be released) is not considered significant, but the individual had made a similar mistake in the past, it would be appropriate for the Commissioner to determine that the penalty be partially remitted by 50%. Therefore the penalty after remission would be 10 penalty units.*
102. *Alternatively, if the facts had shown that this is the first time they received a CRA, but the amount released greater than the amount required to be released is considered significant, it would be appropriate for the Commissioner to determine that the penalty be partially remitted by 25%. Therefore the penalty after remission would be 15 penalty units.*
103. *Please note: remission percentages of 75%, 50% or 25% are used as a guide only. They can be varied, up or down, if the facts and circumstances of the case are different to this example.*
104. *The individual is required to include the amount released in excess of the amount required to be released, which is \$145, in their assessable income for the financial year.*

*Example 7 – No attempt to comply – No penalty remission (0%)*

105. *An individual received a CRA in respect of an ECT liability of \$4,736. The individual realised that they would incur a GIC of \$308 for not paying the ECT*

*liability by the due date, which is at the end of 21 days after the notice of the assessment. The individual sent the CRA to their superannuation providers to withdraw an amount of \$5,044, which was sufficient to pay the ECT liability plus the accrued GIC, from their superannuation plans. The individual was aware that an amount to cover the GIC could not be withdrawn from the superannuation plans.*

106. *Since the total amount released exceeds the amount required to be released, under section 288-100 the individual is liable for an administrative penalty of 20 penalty units.*
107. *In this case, the Commissioner may consider the individual has made no attempt to request an amount equal to their ECT liability to be released under a release authority. That is because there was evidence that the individual made a conscious decision to request an amount released in excess of the amount required to be released so that they could pay for the GIC.*
108. *In this case, it would be appropriate for the Commissioner to determine that no part of the penalty be remitted (as per the table in paragraph 14 of this practice statement). In addition, the individual needs to include the amount released in excess of the amount required to be released, which is \$308, in their assessable income for the financial year.<sup>44</sup>*

*Example 8 – No attempt to comply – No penalty remission (0%)*

109. *An individual received a VRA in respect of an ECT liability of \$450. The individual is not required to withdraw money from their superannuation plan if they choose to pay the liability from their personal resources. The individual paid the liability from their personal resources, but sent the VRA to three different superannuation providers to withdraw the full amount of \$450 from each provider. As a result, the total amount released was \$1,350.*
110. *Since the total amount released exceeded the amount required to be released, under section 288-100 the individual is liable for an administrative penalty of 20 penalty units.*
111. *In this case, the Commissioner may consider the individual has made no attempt to request an amount equal to their ECT liability to be released under a release authority because sending a release authority to three superannuation providers, and not nominating any lesser amounts to be released on each release authority, was a strong indication of their intention to withdraw an amount greater than the amount required to be released.*
112. *In this case, it would be appropriate for the Commissioner to determine that no part of the penalty be remitted (as per the table in paragraph 14 of this practice statement). In addition, the individual needs to include the amount released in excess of the amount required to be released, which is \$900, in their assessable income for the financial year.*

**Superannuation provider failed to release the required amount within 30 days after receiving a release authority**

*Example 9 – Genuine attempt to comply – Full penalty remission (100%)*

113. *A superannuation provider received a release authority from an individual requesting an amount to be released under the release authority. This is the first time the superannuation provider received a release authority. They*

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<sup>44</sup> GIC is a tax-related expense and an individual can claim it as a deduction in their income tax return for the financial year – paragraph 25-5(1)(c) of the ITAA 1997.

*informed the ATO that they had non-liquid assets but a plan was in place to liquidate the assets as soon as they received the release authority.*

114. *Forty days after the date they received the release authority, the money was released as nominated in the release authority.*
115. *Since the superannuation provider did not release an amount under a release authority within 30 days from its receipt date, under section 288-95 the superannuation provider is liable for an administrative penalty of 20 penalty units.*
116. *In this case, the Commissioner may consider the superannuation provider has made a genuine attempt to release an amount under a release authority within a required timeframe because the time taken by the superannuation provider to liquidate their assets is considered reasonable, that is, they did all they could to release the required amount under a release authority.*
117. *In these circumstances, it would be appropriate for the Commissioner to determine that the penalty be remitted in full (as per the table in paragraph 14 of this practice statement).*

*Example 10 – Moderate attempt to comply – Partial penalty remission (75%, 50% or 25%)*

118. *A superannuation provider has established business practices, and had dealt with release authorities received in previous financial years. The ATO contacted the superannuation provider because they had not released any money within 30 days after receiving a release authority from an individual. The superannuation provider informed the ATO that the employee who normally actioned these requests had been on long term leave and they did not have a replacement to complete the task. After finding and training a replacement, the superannuation fund released the required amount 60 days after the release authority's receipt date.*
119. *Since the superannuation provider did not release an amount under a release authority within 30 days from its receipt date, under section 288-95 the superannuation provider is liable for an administrative penalty of 20 penalty units.*
120. *In this case:*
  - *they established business practices to deal with release authorities, but failed to apply adequate safeguards, that is, they failed to find and train a replacement before the employee went on long term leave, and*
  - *they took corrective action to train another staff member to deal with the release authorities.*
121. *In these circumstances, it would not be appropriate for the Commissioner to determine that the superannuation provider has made a genuine attempt to comply. However, their poor management of staff leave cannot be interpreted as not making an attempt to comply. Therefore, it would be appropriate for the Commissioner to determine that the superannuation provider has made a moderate attempt to comply in this case and the penalty be partially remitted (as per the table in paragraph 14 of this practice statement).*
122. *Regarding the circumstances of the case, it is established that:*
  - *the superannuation provider complied with their obligations after being contacted once by the ATO, thus the extent to which they failed to release the required amount within a required timeframe is not considered significant, and*

- *a prior history of complying with their obligations in relation to release authorities in previous financial years, and other dealings with the ATO, indicate they have a good compliance history.*
123. *In these circumstances, it would be appropriate for the Commissioner to determine that the penalty be partially remitted by 75%. The penalty after remission therefore would be 5 penalty units.*
  124. *If the facts had shown that the superannuation provider had made a similar mistake in the past, it would be appropriate for the Commissioner to determine that the penalty be partially remitted by 50%. The penalty after remission therefore would be 10 penalty units.*
  125. *Alternatively, if the facts had shown that the extent of failure is considered significant, that is, the superannuation provider failed to train and deploy another staff member within a reasonable time and they had made a similar mistake in the past, it would be appropriate for the Commissioner to determine that the penalty be partially remitted by 25%. The penalty after remission therefore would be 15 penalty units.*
  126. *Please note: remission percentages of 75%, 50% or 25% are used as a guide only. They can be varied, up or down, if the facts and circumstances of the case are different to this example.*

*Example 11 – No attempt to comply – No penalty remission (0%)*

127. *A superannuation provider was contacted by the ATO because there was no money released from an individual's superannuation plan two months after the individual sent a release authority to the superannuation provider. The superannuation provider informed the ATO that they had non-liquid assets and needed to make a plan to liquidate those assets. However, a month later, they still had not made any plan to liquidate those assets because they would incur a cost in doing so. Six months after receiving the release authority, and after numerous contacts by the ATO, the superannuation provider released the required amount.*
128. *Since the superannuation provider did not release an amount under a release authority within 30 days from its receipt date, under section 288-95 the superannuation provider is liable for an administrative penalty of 20 penalty units.*
129. *In this case, the Commissioner may consider the superannuation provider has made no attempt to release an amount under a release authority within a required timeframe because there was evidence they understood their obligations, but deliberately delayed complying with them.*
130. *In these circumstances, it would be appropriate for the Commissioner to determine that no part of the penalty be remitted (as per the table in paragraph 14 of this practice statement).*

**Attachment A – Guide to penalty remission process**

