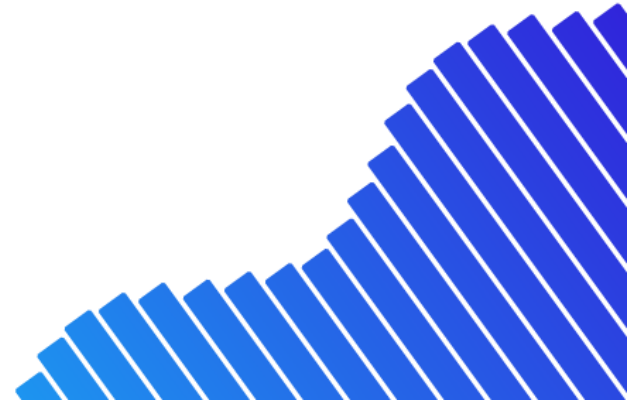


Crimes Amendment (Penalty Unit) Bill 2022

Written by The Tax Institute's Tax Policy and Advocacy Team

Correct as of 11 November 2022



Purpose of this article

This article provides an update on the *Crimes Amendment (Penalty Unit) Bill 2022* (the **Bill**) that was introduced in the House of Representatives on 9 November 2022. This measure was announced as part of the [October 2022-23 Federal Budget](#). Although the Bill has not yet passed both houses and received Royal Assent, it is unlikely to be contested in Parliament.

[The Bill](#) proposes to amend the *Crimes Act 1914* (**Crimes Act**) to increase the value of the penalty unit for Commonwealth criminal offences from \$222 to \$275. The increase to the penalty unit value will apply only to offences committed on or after 1 January 2023 and will not impact on current proceedings for Commonwealth offences. The penalty unit will continue to be indexed to the Consumer Price Index (**CPI**) every three years, with the next round scheduled to occur on 1 July 2023.

From a tax perspective, taxpayers may be subject to penalties for failing to meet some key taxation obligations. These are discussed in further detail below.

Background

The purpose and role of penalty units

Penalty units are used to describe the amount payable for monetary penalties imposed for criminal offences in Commonwealth legislation and Territory ordinances. Commonwealth penalties are generally expressed in terms of penalty units rather than specific values in an attempt to assist with the adjustment of penalties across Commonwealth legislation.

The penalty unit mechanism also allows for the maximum monetary penalty for all offences under Commonwealth law, including Territory ordinances, to be automatically adjusted with a single amendment to section 4AA of the Crimes Act. This removes the need for multiple legislative amendments and ensures that monetary penalties in Commonwealth legislation and Territory ordinances remain comparable.

Maintaining the value of the penalty unit over time is considered necessary to ensure that the financial penalties for Commonwealth offences reflect community expectations and continue to remain effective in deterring unlawful behaviour.

Increasing the value of a penalty unit will increase the maximum fine or financial penalty prescribed by legislation for a relevant offence. It should be noted that the imposition of a penalty unit does not alter any obligations to apply other or more appropriate penalties in all circumstances.

Penalties in taxation legislation

Failure to meet a tax obligation may result in a penalty being applied. Tax laws authorise the ATO to impose [administrative penalties](#) when taxpayers fail to meet their tax obligations. Penalty provisions are there to encourage all taxpayers to take reasonable care in complying with their tax obligations. The ATO considers a taxpayer's circumstances when deciding what action to take.

If a taxpayer is liable to a penalty, the ATO will notify them in writing and include:

- the reason for the penalty;
- the amount of the penalty; and
- the due date for payment (at least 14 days after the ATO gives notice).

Taxpayers cannot claim a deduction for imposed penalties.

Historical penalty unit amounts

When the penalty unit regime was introduced in 1992, its value was set at \$100. This value was adjusted at irregular intervals until 2015 where the Crimes Act was amended to introduce an indexation mechanism to automatically increase the value of the penalty unit every three years in line with CPI. Table 1 below notes the historical penalty unit amounts for the purposes of taxation legislation.

Table 1: Historical penalty unit amount

When infringement occurred	Penalty unit amount
On or after 1 January 2023	\$275
1 July 2020 to 31 December 2022	\$222
1 July 2017 to 30 June 2020	\$210
31 July 2015 to 30 June 2017	\$180
28 December 2012 to 30 July 2015	\$170
Up to 27 December 2012	\$110

Failure to lodge on time penalty

The ATO can issue penalties if a taxpayer fails to meet their tax lodgment obligations on time. Taxpayers may receive a [failure to lodge \(FTL\)](#) on time penalty if they have an obligation to lodge or report by a particular date, but fail to lodge by that due date. This may include, the lodgment of tax returns, Pay As You Go (PAYG) withholding or instalments, and Goods and Services Tax (GST) lodgments. FTL penalties are one of the more common penalties to which taxpayers may be subjected.

In some instances, taxpayers don't meet their lodgment obligations on time even though they act in good faith and act with the best intentions. Penalties may not be applied in isolated instances of late lodgment. In determining that penalties should not be applied, the ATO will consider a taxpayer's circumstances when deciding what action to take.

Lodgments to which the ATO apply FTL penalties

An automated penalty system applies the FTL penalty to late-lodged returns, reports and statements, including:

- activity statements
- tax returns
- Fringe Benefits Tax (FBT) returns
- PAYG withholding annual reports
- Single Touch Payroll reports
- annual GST returns and information reports
- taxable payment annual reports.

The ATO may also manually apply FTL penalties. This usually occurs in situations of escalating non-compliance. For example, where a taxpayer has not lodged after a request to do so. Generally, a penalty will not be applied to a late-lodged tax return, FBT return, annual GST return or activity statement if the lodgment results in either a refund or a nil result, unless:

- FTL penalty was applied before the return or statement was lodged (that is, the penalty will not be remitted even if the subsequent lodgment results in a refund or nil result);
- the unlodged item is a third party data report, such as a taxable payments annual report; or
- the taxpayer is classified as a large entity.

How the ATO calculate an FTL penalty

How the ATO calculate an FTL penalty will primarily depend on the size of the entity. Below we have noted the FTL penalties, from 1 January 2023, for the different categories of entities.

Small entities

For a small entity, the FTL penalty is calculated at the rate of 1 penalty unit (or \$275) for each period of 28 days (or part thereof) that the return or statement is overdue, up to a maximum of 5 penalty units (that is, \$1,375).

Medium entities

For a medium entity, the FTL penalty is 2 penalty units (or \$550). A 'medium entity' is a medium withholder for PAYG withholding purposes or has assessable income or current GST turnover of more than \$1 million and less than \$20 million.

Large entities

For a large entity, the FTL penalty is 5 penalty units (or \$1,375). A 'large entity' is a large withholder for PAYG withholding purposes or has assessable income or current GST turnover of \$20 million or more.

Significant entities

For a [significant global entity](#) (SGE), the base penalty amount is 500 penalty units. The penalty amount increases based on the length of the delay in lodging. **Table 2** below notes the penalty amounts for SGEs under the existing and proposed legislation.

Table 2: SGE FTL penalty amount summary

Days late	Penalty units	Penalty from 1 July 2020 to 31 December 2022	Penalty from 1 January 2023
28 or less	500	\$111,000	\$137,500
29 to 56	1,000	\$222,000	\$275,000
57 to 84	1,500	\$333,000	\$412,500
85 to 112	2,000	\$444,000	\$550,000
More than 112	2,500	\$555,000	\$687,500

Requesting remission

If a taxpayer receives a penalty notice for failing to lodge a return or statement on time, they can ask for a [remission](#) if there are extenuating circumstances. The ATO have discretion to reduce (remit) the penalty according to the taxpayer's circumstances.

Extenuating circumstances may include situations such as, being impacted by a natural disaster or serious illness. It can also include other circumstances outside of a taxpayer's control which could not be predicted and occurred when the taxpayer, or their representative, were not in a position to request further time to lodge.

Remissions can be provided in full or in part. However, remissions can only be sought once the taxpayer lodges the outstanding returns or statements.

For more information, see [PS LA 2011/19](#) *Administration of the penalty for failure to lodge*.

Safe harbour from FTL penalty

If taxpayer engaged a registered tax agent or BAS agent to lodge their return or statement, an FTL penalty may not apply if both of the following apply:

- the taxpayer can show that they provided the agent with all relevant tax information to enable them to lodge the return or statement by the due date; and
- the agent's failure to lodge the return or statement was not because they were reckless or intentionally disregarded the law.

To be eligible for safe harbour, taxpayers need to provide evidence that they supplied all the relevant information to enable the agent to lodge the return or statement by the due date. If the ATO determine that the safe harbour provision does not apply, a remission of FTL penalty can still be sought if the conditions above are satisfied.

Other taxation penalties

Aside from FTL penalties, the taxation and superannuation legislation contain several other administrative penalties that will now be effectively increased. An overview of some of the potential penalties is contained in **Table 3** below.

Table 3: Summary of other penalties

Infringement	Maximum penalty units	Maximum penalty amount from 1 Jan 2023
Individual found to be a promoter of a tax avoidance scheme	5,000	\$1,375,000
Body corporate found to be a promoter of a tax avoidance scheme	25,000	\$6,875,000

Infringement	Maximum penalty units	Maximum penalty amount from 1 Jan 2023
SMSF auditors who fail to provide the audit report to the trustees within the prescribed period	50	\$13,750
Failure to comply with record keeping requirements under section 245-265 of the ITAA 1997	30	\$8,250
Individuals convicted of failing to keep Superannuation Guarantee charge (SGC) records	30	\$8,250
Failure to keep or retain tax records as required	20	\$5,500
Failure to issue a tax invoice or adjustment note when required	20	\$5,500
Failure to provide access and reasonable facilities to an authorised tax officer	20	\$5,500
Faily to apply for, or cancel, GST registration when required	20	\$5,500
Failure to register a PYG withholder when required	5	\$1,375

Further guidance and information

Further guidance and information is available on the [ATO website](#).

If you have any specific concerns that have not been outlined above, please email taxpolicy@taxinstitute.com.au.

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