

## THE REMISSION OF PENALTIES UNDER THE PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION ACT 1991

*Bianca Treagar\**

### Introduction

The Levies Revenue Service (LRS) is an agency of the Australian Government Department of Agriculture, Fisheries and Forestry. The role of the LRS is to administer the efficient and effective collection and disbursement of levies and charges imposed by Commonwealth legislation on a wide range of rural commodities. These Commonwealth levies and charges are collected under the *Primary Industries Levies and Charges Collection Act 1991* (hereafter *PILCC Act*). Late payment penalties were imposed by LRS from 1st January 2003 following a period of about two years in which penalties could not be calculated due to difficulties with the accounting software. It is thus an opportune time to review the current decision-making process<sup>1</sup> for remission of penalties. This paper is limited to examining the remission of late payment penalties under s16 of the *PILCC Act*, and will not address instances of department initiated penalty remission.

Section 15 of the *PILCC Act* imposes penalties for late payment of levies at the rate of 2% per month on the outstanding levies or charges and s16 provides for remission of penalties.<sup>2</sup> Section 16 (1) of the Act confers discretion on the Minister or an authorised person to remit the whole or part of a penalty amount payable under s15. A decision made under s16(1) is appealable to the Administrative Appeals Tribunal under s28(5).

Government departments and agencies are not only confined by inherent legal parameters imposed by statute but are also influenced and structured by constitutional principles and the political climate in which they exist. However, while an administrative body may be operating lawfully within this sphere, significant benefits can be achieved by adopting a proactive approach to government administration. This paper examines how the decision-making process for the remission of late payment penalties could be improved and the administrative principles which underpin these goals. These benefits will be evaluated by their capacity to effectively contribute to achieving efficiency, consistency and transparency and by the extent to which they uphold the department's Client Service Charter. Central to this evaluation, and in particular, achieving efficiency and consistency, is an examination of how policy guidelines are used in the decision-making process to confine the exercise of discretion. The accessibility and content of information disseminated and reasons for decisions is intrinsic to evaluating the transparency and openness of decisions. Although requests for remission of penalties under s16 of the *PILCC Act* is not a high-volume decision-making area,<sup>3</sup> it demands considerable resources to be properly administered. This paper will demonstrate how implementing three key recommendations will deliver greater efficiency, consistency and transparency in this process. It is recommended that the Levies Revenue Service:

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1. Improve client access to information
2. Formulate more flexible guidelines for penalty remission
3. Improve communication of reasons for decisions.

### **Upholding the principles of the Client Service Charter**

Since the transformation of administrative law in the 1970's, Australia has seen an improvement in the framework for government decision-making.<sup>4</sup> One example is the development of client service charters which routinely commit government agencies to establish standards of administrative decision-making, such as providing reasons for decisions and establishing client complaint procedures. The department's Client Service Charter sets out accountability principles and grievance procedures.<sup>5</sup> Among the service standards it sets include being objective and unbiased in decision-making, communicating openly and providing explanations for decisions. The recommendations above not only support, but actively encourage, the principles of the department's Client Service Charter.

### **Openness and Access to Information**

Understanding how decisions are made and the criteria on which decisions will be based is essential to an accountable and open government. It follows from this that access to information and documents relating to the process of decision-making is essential.<sup>6</sup> It is suggested that the LRS makes available to its clients general advice as to the criteria against which their request will be assessed. The existence of the *Freedom of Information Act 1982* (Cth) does not preclude the LRS from making this policy readily available to its clients. Indeed, the role of freedom of information legislation should be considered a last resort where other avenues of obtaining the information have proved inadequate.<sup>7</sup> Levy payers seeking remission of penalties will generally consult one of the following sources of information: telephone call to LRS office, written letter, information brochure or the agency's website.<sup>8</sup> The website has no specific information about the procedure for lodging a request for penalty remission. It directs clients to the levy information brochures which themselves advise the client to call their nearest LRS office. LRS officers will generally advise a client who is enquiring over the telephone about remission to submit their request in writing. Current practice within LRS is for officers to advise clients to put their request in writing and under no circumstances should an officer offer an opinion as to the possible outcome of a decision. While the doctrine of legitimate expectation, in terms of giving rise to duty to accord procedural fairness, is no doubt an important consideration here, it is contended that providing general advice in a standard form such as a brochure or on the agency's website would encourage openness and transparency without compromising the exercise of the Minister's discretion. Disclosure of the policy may increase instances of abuse of the system by enabling levy payers to mould their grounds for requesting the remission to fit within the relevant criteria. This could be circumvented, at least partially, by carefully wording and limiting the information disseminated, for example, by including the broad objective considerations and information about circumstances in which penalty will not be remitted but omitting specifying circumstances in which it will. Such information should include a statement to the effect that each case will be considered on its merits.

In *Re Scott and Minister for Primary Industries and Energy*,<sup>9</sup> an appeal to the Administrative Appeals Tribunal on a decision not to remit penalties, one of the submissions was that there was a failure by the department to communicate the policy to the applicant at any of the meetings held prior to the payment being made in full. Importantly, the appellant did not argue that the policy adopted was unfair, only that it was not communicated to him. The Deputy President stated that 'failure to communicate the policy had no bearing on the appropriateness of the policy'.<sup>10</sup> Thus, while the appellant did not ultimately succeed on these grounds, at a practical level, it supports the contention that considerable resources could have been better directed if disclosure of the relevant policy and other documents had

taken place at a much earlier stage in the process. If the relevant criteria and reasons for the decision had been made available to the appellant this may have assuaged his sense of injustice, notwithstanding that he may not necessarily have agreed with the decision. Indeed, this demonstrates the value of participation in the process: not only is a fair decision made but a fair decision is *seen* to be made. Access to information and documents relating to the process of decision-making is essential to achieving this open relationship.

**The Role of Discretion in the Decision Making Process: being open without compromising the integrity of the Minister's discretion**

How is good decision-making measured? There are no absolute or determinable standards.<sup>11</sup> However, discretionary powers, a central notion of administrative law, forms a crucial element in the framework for creating a benchmark model. Discretion, in the context of administrative decision-making, is a choice between lawful alternatives. It is both an inevitable and desirable element of administrative decision-making.<sup>12</sup> As KC Davis contends in his classic argument for seeking the optimum balance between rules and discretion, even where rules can be written, discretion is often better as it fills the need for individualised justice.<sup>13</sup> Rules without discretion leave little or no room for unique individual circumstances to be taken into account. But while discretion allows the decision-maker to consider individual circumstances and offers the flexibility and element of choice which is intrinsic to the rule of law, it leaves the task open to the risk of arbitrary decision-making and inconsistency. This is because administrative decisions are not simply a syllogistic process of application of legal rules to facts; personalities, resources, skills, knowledge, politics and methods all affect the decision-making process.<sup>14</sup> Discretion can be confined by rules, policy statements and guidelines. Policy is also a means of achieving consistency in decision-making and the good administration of government demands a high level of consistency. This is an important consideration for the LRS due to the geographically fragmented nature of the agency. It has four regional offices nationally and a central office. It has developed an operating manual, the 'Guidelines for Remission of Penalties', which outlines the relevant policy considerations for remission of penalties.

Policy itself must be lawful and is limited to the statutory context in which it exists. Particularly in cases where a broad discretion is conferred on administrators, it is widely acknowledged that policy guidelines and manuals should 'echo rather than supplant legislation'.<sup>15</sup> Section 16(1) of the *PILCC Act* confers discretion on the Minister or an authorised person to remit the whole or part of a penalty amount payable under section 15. This provision, subject to subsection (2), which limits the amount that can be remitted under subsection (1) to \$5,000 or such lower amount as is specified in the authorisation', vests a broad discretionary power in the Minister. However, discretion is confined by the policy objectives, as stated in s3 of the Act, the broad interpretation of the Act and the common law principle of ultra vires. For example, in *Re Scott*, Deputy President McMahon interpreted the discretion, having regard to the scope and purpose of the statute.<sup>16</sup> This common law principle is now also reflected in 5(2)(b) *Administrative Decisions (Judicial Review) Act 1977*. Deputy President McMahon also had regard to an affidavit of the executive director of the Australian Meat and Livestock Industry Policy Council which set out examples of the uses of the levy funds. He also considered an affidavit of the executive director of the Cattle Council of Australia which gave details of matters of national and industry significance which depend upon the levy. In other Administrative Appeals Tribunal hearings concerning the remission of penalties<sup>17</sup> the views of Deputy President McMahon in *Scott* have been affirmed, the respective members also concluding that the guidelines were lawful and consistent with the objects of the Act. Therefore, it is likely that, in any future appeals in this area, the guidelines will also be held to be lawful. Despite this, the LRS should take a proactive approach to ensuring that the guidelines are sufficiently flexible so that individual, unique circumstances which cannot be foreseen can be taken into account without the need for the decision maker to be satisfied that the circumstances are exceptional.

### Establishing a Flexible Policy

Where policy exists in a particular decision-making area, administrators need to be careful that it is not applied inflexibly without regard to the merits of the particular case. Decisions whether or not to remit penalty are made by Regional Support Officers and Investigation Officers. These recommendations are endorsed by the Regional Manager and submitted to the Director for approval. Thus, if a policy exists, it should, in most instances, guide the decision-maker otherwise consistency is undermined. However, if the policy leaves open too narrow a window of discretion, it is likely that the policy will be too rigid and rule based to allow discretion, in truth, to be exercised by the recommending officer. The policy guidelines currently in place are particularly prescriptive about the criteria upon which decisions are made. For example, it details the specific timings to be taken into account for postal deliveries with Australia Post, special circumstances beyond the levy payer's control, ignorance of initial liability, levy payer mistakes and bankruptcy and external administration. In essence, these guidelines only leave open to the Minister a reason to depart from the policy in cases of 'exceptional circumstances'. As Brennan J said in *Re Drake and Minister for Ethnic Affairs (No 2)*,<sup>18</sup> there are substantial reasons which favour only 'cautious and sparing departures' from Ministerial policy.<sup>19</sup> Although Brennan J was referring to policy which has been scrutinised by Parliament, other observations support the appropriateness of following Ministerial policy.<sup>20</sup> In general, Ministerial policy should be followed unless it is either not lawful<sup>21</sup> or unless an injustice would occur in the particular circumstances.<sup>22</sup> In *Re Scott* the reasons put forward by the applicant were clearly outside the circumstances outlined in the guidelines for remission of penalties. Thus, the applicant relied on an argument that 'special circumstances' warranted, as a matter of justice, departure from the guidelines in this particular case. This argument that 'special circumstances' warranted remission in their respective cases was also put forward by the appellants in each of the cases *Mansfield Meat Supplies*,<sup>23</sup> *Ray Brooks Pty Ltd*<sup>24</sup> and *Tarago River Cheese*.<sup>25</sup> However, *Mansfield Meat Supplies* was the only one of these appellants who was successful on this ground. In that case Deputy President McDonald said that while the individual reasons put forward by the appellant may not constitute sufficient reason for remission, the co-existence of a number of these circumstances justified a special circumstance. It can be seen that demonstrating exceptional circumstances may be difficult for an applicant. It is recommended that the guidelines be formulated in more flexible terms, allowing the Minister to have regard to individual circumstances of the case without the need for these circumstances to be exceptional.

### Reasons for Decisions and Transparency

'At a practical level knowing why an administrator has made a decision which is adverse to one's interests is crucial to the formation of a view as to the fairness of the decision'.<sup>26</sup> Empowering clients with this information will enable them to make an informed judgment as to whether the decision was made fairly. Was the decision made by adherence to policy guidelines? Was the policy applied appropriately? Was an unfair policy adopted? Was an error of law made? Answers to these questions will enable clients to make a decision as to whether the matter ought to be taken further. Currently, in its letters to clients advising that a decision has been made not to remit a penalty, no specific reasons are given. For example, clients are advised that, 'The authorised officer has considered your request and has determined that the reasons given do not constitute sufficient reasons for remission'. Draft documents prepared under the current departmental policy review indicate that reasons for decisions will be included in future letters to clients refusing remission. This is a positive move towards open decision-making, however, to be a useful source of information this must be coupled with information about criteria for penalty remission.

Empowering people with information about the department's decision-making policies and practices no doubt exposes the task to greater scrutiny. However, human experience shows

that where decisions are open to scrutiny, decision-makers are likely to ensure that care is taken and that decisions made are based on sound judgement and fair process.<sup>27</sup> This will no doubt encourage better decision-making. Furthermore, it will place the person making the request in a position to make an informed and coherent argument and to make available to the LRS relevant information, thereby improving efficiency in the process. It could also be argued that revealing the criteria upon which decisions are based and the provision of reasons for decisions undermines the Minister's discretion. It risks creating a rigid rule-based system in which discretion, in truth, is no longer present. However, it is not suggested that the information disseminated include specific criteria or absolute statements. Rather, as discussed above, communicating the broad policy objectives which underpin the decision-making process will achieve a balance between openness and integrity.

### Conclusion

The three key recommendations of this paper will deliver greater efficiency, consistency and transparency in the decision-making process. Not only do these recommendations uphold the principles of the department's Client Service Charter, they actively promote them. Formulating its guidelines in more flexible terms will allow the Minister to have regard to the individual circumstances of the case without the need for these circumstances to be exceptional. This will no doubt deliver greater efficiency and fairness to the decision-making process. Improving client access to information and communication of reasons for decisions will establish an open and accountable relationship between the department and its clients. Furthermore, it enables the person affected by the decision to participate in the decision-making process. This promotes an appearance of impartiality and preserves confidence in the system. It can be seen that by adopting a proactive approach to improving its decision making practices, the Levies Revenue Service will be able to deliver a higher standard of service to its clients.

### Endnotes

- 1 This phrase is to be interpreted in a broad sense to include the process of making general rules as well as decisions of individual application; it's meaning is not restricted to procedural issues; Cane, P, *An Introduction to Administrative Law*, Oxford University Press, Oxford, 1996 at 133.
- 2 The relevant sections of the *PILCC Act* are set out in Appendix A.
- 3 The LRS has received about 100 applications for penalty remission since 1 January 2003.
- 4 McMillan J, 'Better Decision Making: By What Standard?' (2002) 105 *Canberra Bulletin of Public Administration* 43 at 44.
- 5 The relevant sections from the department's Client Service Charter are set out in Appendix B.
- 6 Douglas, R, *Douglas and Jones Administrative Law*, 4th ed, The Federation Press, Sydney, 2002 at 89.
- 7 Administrative Review Council and Australian Law Reform Commission, 'Open Government: A Review of the Federal *Freedom of Information Act 1982*' (1995) AGPS, Canberra.
- 8 [www.affa.gov.au/levies](http://www.affa.gov.au/levies).
- 9 (1994) 35 ALD 157.
- 10 At 165.
- 11 McMillan, op cit n 4 at 46.
- 12 Allars, M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990 at 10.
- 13 Davis, KC, *Discretionary Justice: A Preliminary Enquiry*, Louisiana State University Press, 1969 at 17.
- 14 Allars, op cit n 12 at 3.
- 15 McMillan, op cit n 4 at 43.
- 16 (1994) 35 ALD 157 at 162.
- 17 *Re Tarago River Cheese Co Pty Ltd and Minister for Primary Industries and Energy* (1996) 41 ALD 605; *Re Ray Brooks Pty Ltd and Minister for Primary Industries and Energy* (1995) 42 ALD 122; and *Re Maclure and Minister for Primary Industries and Energy* (1997) 4 ALD 757.
- 18 (1979) 2 ALD 634.
- 19 At 644.
- 20 *Re Dainty and Minister for Immigration and Ethnic Affairs* (1987) 12 ALD 416.
- 21 *Green v Daniels* (1997) 13 ALR 1; *Re Secretary Department of Social Security and Diepenbroeck* (1992) 27 ALD 142.
- 22 *Minister for Immigration, Local Government and Ethnic Affairs v Roberts* (1993) 113 ALR 151.

- 23 *Re Mansfield Meat Supplies Pty Ltd and Minister for Primary Industries and Energy* (1996) 41 ALD 609.
- 24 See note 17.
- 25 *Ibid.*
- 26 Allars, M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990, at 129.
- 27 McMillan, *op cit*, n 4 at 43.

## APPENDIX A

The relevant sections of the **Primary Industries Levies and Charges Collection Act 1991** are set out below:

### 3 Objects

The objects of this Act are:

- (a) to rationalise levy and charge collection; and
- (b) to make provision for the efficient and effective collection of primary industry levies and charges.

### 15 Penalty for late payment

- (1) If any levy or charge in relation to collection products remains unpaid after the time when it became due for payment, there is payable by the producer to the Commonwealth, by way of penalty accruing from the time the levy or charge became due for payment until it is paid in full, an amount worked out as follows:
  - (a) during the month in which the levy or charge became due for payment the amount of penalty accrues at the rate of 2% per month on the levy or charge due;
  - (b) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the amount of levy or charge then payable and penalty payable at the end of the previous month.
- (2) Where:
  - (a) an intermediary deducts an amount under subsection 8(1) in relation to the unpaid levy or charge on any collection products; and
  - (b) the intermediary does not pay the amount deducted to the Commonwealth, a collecting authority or a collecting organisation at or before the time when the levy or charge became due for payment;

there is payable by the intermediary to the Commonwealth, by way of penalty accruing from the time the levy or charge became due for payment until the amount deducted is paid to the Commonwealth, an amount worked out as follows:

- (c) during the month in which the levy or charge became due for payment the amount of penalty accrues at the rate of 2% per month on the amount deducted;
  - (d) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the unpaid amount deducted and penalty payable at the end of the previous month.
- (3) Where:

- (a) a person purchases prescribed goods or services in respect of a collection product of a particular kind; and
- (b) a person fails to pay to the seller of those goods or services an amount on account of levy or charge (in this subsection called the **unpaid amount**) in accordance with subsection 9(2) within the period prescribed for the purposes of that subsection;

there is payable to the Commonwealth by the person, by way of penalty accruing from the end of that period until the unpaid amount is paid to the seller, an amount worked out as follows:

- (c) during the month in which that period ends the amount of penalty accrues at the rate of 2% per month on the unpaid amount;
- (d) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the unpaid amount and penalty payable at the end of the previous month.

(4) Where:

- (a) a person who sells prescribed goods or services has received an amount on account of levy or charge; and
- (b) that person does not pay the amount received to the Commonwealth before the end of the period within which, under subsection 9(1), it should have been so paid;

there is payable to the Commonwealth by that person, by way of penalty accruing from the end of that period until the amount is so paid to the Commonwealth, an amount worked out as follows:

- (c) during the month in which that period ends the amount of penalty accrues at the rate of 2% per month on the amount received;
- (d) during the next and each subsequent month the amount of penalty consists of the sum of each amount that accrued during a previous month and the amount accruing during that month at the rate of 2% per month on the sum of the amount received and penalty payable at the end of the previous month.

## 16 Remission of penalty

- (1) Where an amount of penalty becomes payable under section 15 because an amount of levy or charge in respect of particular collection products remains unpaid after the time when it becomes due for payment, the Minister or an authorised person may, subject to subsection (2), remit the whole or a part of that amount of penalty.
- (2) An amount remitted by an authorised person under subsection (1) is not to exceed \$5,000 or such lower amount as is specified in the authorisation.

## 28 Reconsideration and review of decisions

- (1) A person affected by a relevant decision who is dissatisfied with the decision may, within 28 days after the day on which the decision first comes to the notice of the person, or

within such further period as the Minister (either before or after the end of the period) by notice in writing served on the person allows, by notice in writing given to the Minister, request the Minister to reconsider the decision.

- (2) A request under subsection (1) must set out the reasons for making the request.
- (3) The Minister must, within 45 days after receiving a request under subsection (2), reconsider the relevant decision and may make a decision:
  - (a) in substitution for the relevant decision, whether in the same terms as the relevant decision or not; or
  - (b) revoking the relevant decision.
- (4) Where, as a result of a reconsideration under subsection (3), the Minister makes a decision in substitution for or revoking a relevant decision, the Minister must, by notice in writing served on the person who made the request under subsection (1) for the reconsideration, inform the person of the result of the reconsideration and give the reasons for his or her decision.
- (5) An application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister under subsection (3).
- (6) A person who makes a relevant decision must give to a person affected by the decision a statement in writing to the effect that a person affected by the decision:
  - (a) may, if the person is dissatisfied with the decision, seek a reconsideration of the decision in accordance with this section; and
  - (b) may, subject to the Administrative Appeals Tribunal Act 1975, if the person is dissatisfied with a decision made upon that reconsideration, make application to the Administrative Appeals Tribunal for review of that decision.
- (7) Where the Minister makes a decision under subsection (3) and gives to a person affected by the decision notice in writing of the making of the decision, that notice must include a statement to the effect that, subject to the Administrative Appeals Tribunal Act 1975, application may be made to the Administrative Appeals Tribunal for review of the decision to which the notice relates by or on behalf of a person affected by the decision.
- (8) A failure to comply with the requirements of subsection (6) or (7) in relation to a decision does not affect the validity of the decision.
- (9) In this section:

**relevant decision** means:

  - (a) a decision to refuse to remit, under subsection 16(1), the whole or part of an amount; or
  - (d) a determination by the Secretary, or a delegate of the Secretary, under subclause 5(2) of Schedule 8 to the Primary Industries 12 (Excise) Levies Act 1999, of the declared value of a quantity of deer velvet used in the production of other goods; or

- (e) a determination by the Secretary, or a delegate of the Secretary, under paragraph 3(3)(a) of Schedule 6 to the Primary Industries (Customs) Charges Act 1999, of the declared value of a quantity of deer velvet exported from Australia.

## APPENDIX B

The relevant sections of the Australian Government Department of Agriculture Fisheries and Forestry Client Service Charter are set out below:

### **Our service standards**

We aim to provide a high level of service to you by:

- providing prompt and accurate information on request  being professional in our manner by dealing with you competently and openly, and by communicating clearly. We will:
- include contact names and phone numbers in our correspondence
- consult widely before making decisions
- inform you about decisions that will affect you.
- being objective and unbiased in our decision making. We will:
- seek to engage you, where possible, on policy proposals that affect you
- give you reasonable time to respond to policy proposals.
- being respectful and sensitive to your needs and being fair and efficient in our dealings with you. We will:
- explain our decisions
- provide clear, accurate, ongoing advice and information.
- being accountable and adhering to sound business practices in accordance with the Public Service Act 1999 and other relevant legislation. We will:
- monitor our performance by analysing feedback and assessing the extent to which we have consulted
- strive at all times to manage our work efficiently and effectively.
- being accessible. We will:
- try to make contacting the correct staff as easy as possible
- try to have staff available when required  ensure the information you need is easy to get.
- The department's values of professionalism, integrity, openness, fairness and respect underpin these standards.

