Australian Government
Australian Taxation Office

Law Administration Practice Statement

PS LA 2011/10

This Practice Statement is an internal ATO document and an instruction to ATO staff.

SUBJECT: **Waiver of tax-related liabilities in proceeds of crime matters**

PURPOSE: **This Practice Statement provides guidelines for the exercise of the Commissioner's power to waive the Commonwealth's right to payment of certain tax-related liabilities, in appropriate cases, in order to facilitate proceedings under the *Proceeds of Crime Act 2002***

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BACKGROUND

1. The *Proceeds of Crime Act 2002* (POCA) provides a comprehensive scheme to trace, investigate, restrain and confiscate the proceeds, instruments and

benefits of crime (including value-based confiscation via pecuniary penalties, unexplained wealth and literary proceed orders). The POCA primarily applies in relation to Commonwealth offences but has scope to apply to State and Territory offences and foreign indictable offences in some circumstances.

2. The POCA provides 2 streams for the confiscation of illicit wealth and instruments of crime:

   - conviction-based confiscation, upon conviction of an offence, and
   - non-conviction-based confiscation, which enables restraint and confiscation without the necessity of securing a criminal conviction.

3. The standard of proof required for non-conviction-based confiscation is the standard in civil proceedings ('on the balance of probabilities'). While this is a lower standard of proof than that of conviction-based confiscation ('beyond reasonable doubt'), it still requires a sufficiently high standard of admissible evidence to satisfy the court that an offence has been committed.

4. The principal objects of the POCA include:

   - depriving persons of the proceeds, instruments and benefits of crime (including literary proceeds and unexplained wealth amounts)
   - punishing and deterring persons from breaching the laws of the Commonwealth
   - preventing the reinvestment of proceeds, instruments and benefits of crime in further criminal activities
   - undermining the profitability of criminal enterprises, and
   - giving effect to Australia's obligations under various international agreements relating to proceeds of crime, money-laundering and other serious criminal offences.

5. All legislative references in this Practice Statement are to Schedule 1 to the *Taxation Administration Act 1953*, unless otherwise indicated.

TERMS USED

6. The following terms are used in this Practice Statement.

Table 1: Terms used in this Practice Statement

Term	Description
AFP	Australian Federal Police
AFP Commissioner	Commissioner of the AFP
assets levied in execution	assets seized by a sheriff or bailiff under a warrant of seizure and sale for the purpose of satisfying the claim of a judgment creditor
Commissioner	Commissioner of Taxation
confiscation	process by which property and benefits are seized from a person's possession or effective control and forfeited to the Commonwealth by way of court order or operation of statute, to give effect to the objectives of the POCA

conviction-based confiscation	confiscation of property predicated on its owner having been convicted of an indictable or serious offence
Criminal Assets Confiscation Taskforce (CACT)	Commonwealth multi-agency task force created to investigate, restrain and confiscate proceeds of crime We are a member of the CACT, which commenced operation as a permanent entity on 1 January 2012 and is led by the AFP. Since that date, the CACT has been responsible for the vast majority of Commonwealth-based proceeds of crime litigation, acting for the AFP Commissioner in their role as a proceeds of crime authority under the POCA. The Commonwealth Director of Public Prosecutions (CDPP) is also a proceeds of crime authority and retains a role in the confiscation of criminal assets.
pecuniary penalty order	an order of the court requiring the person against whom it is made to pay a specified amount to the Commonwealth in respect of benefits derived from the commission of offences
restraining order	in the context of this Practice Statement, an order of the court made under the POCA which prohibits or restricts the disposal of, or dealings with, the property that is subject to the order These orders are obtained in respect of passive assets. Where the property subject to the order comprises of ongoing business property, the court will appoint an Official Trustee to manage this property.
waiver	in the context of this Practice Statement, a release from a taxpayer's obligation to pay certain tax debts which we may grant to a taxpayer in order to facilitate a tax-related proceeding under the POCA The effect of a waiver is that the waived debt owed to the Commonwealth is extinguished so that the Commonwealth cannot pursue that debt at a later date.

The *Proceeds of Crime Act 2002* from a tax perspective

7. The POCA is important in the tax context for a number of reasons. In some tax fraud cases, it has been more effective to pursue confiscation action under the POCA rather than under traditional ATO recovery processes. Examples of such cases include where:

   - offenders have concealed their assets by setting up artificial ownership by family members or controlled structures, such as companies or trusts, designed to defeat the operation of the tax laws

- an offender has endeavoured to defeat tax laws using a bankruptcy or family law arrangement (action under the POCA takes priority over both bankruptcy and family law proceedings)
- evidence relating to a tax fraud is located in an overseas jurisdiction or property required to satisfy a tax-related liability is located overseas (this is because, in some instances, countries more readily provide assistance in recovering proceeds of crime than for recovering tax-related liabilities).

8. The advantages of taking action under the POCA include the:

- ability to target assets legally owned by a person, as well as assets which are subject to their 'effective control' (which is broadly defined and captures property regardless of whether or not the person has a legal or equitable estate or interest in the property, or a right, power or privilege in connection with the property[1])
- power to conduct compulsory examinations of any person about the affairs of the suspected offender, their spouse or de facto partner, or any other person with an interest in the property (which may include company directors and trustees), in order to gather information for the investigation and proceedings under the POCA
- ability to obtain restraining orders to preserve the targeted assets under the offender's effective control pending conclusion of proceedings under the POCA
- ability to seek pecuniary penalty orders against a person, not only in respect of benefits received by or payable to that person individually, but also benefits received by other entities or persons as a result of the first person's conduct.

9. The POCA is also important in the tax context where criminal investigations under the POCA which do not start off as tax-related investigations end up having significant tax implications. For example, investigations into cash 'structuring' and other money-laundering arrangements by the AFP may uncover significant understatement of income to us. In such matters, the criminal investigation and associated proceedings under the POCA would generally have been commenced before we uncover any tax implications as a result of subsequent ATO investigative or audit action.

10. Given the importance of the POCA in the tax context, it is imperative that in all of the types of cases outlined in this Practice Statement, the POCA and the tax processes work together effectively and do not come into conflict.

Difficulties in facilitating matters under the *Proceeds of Crime Act 2002*

11. The Commissioner's basic duty is to administer taxation laws. This duty includes assessing and collecting taxes and delivering entitlements arising under those laws. The general rule is that we do not forgo tax properly payable and will seek to collect the full amount of that tax unless there is a legislative basis for not doing so.

12. Accordingly, wherever possible, we will use the traditional debt recovery processes as the first option to enforce collection of tax-related liabilities and it is only where such avenues of collection are not available or feasible that cases are considered for referral to the CACT for action under the POCA.

[1] Refer to section 337 of the POCA for the full definition of 'effective control'.

13. Once action is commenced under the POCA, we have limited discretion under the law to refrain from either raising assessments or taking action to fully enforce a tax-related liability.

14. Historically, these limitations created difficulties for the CDPP in effectively managing and settling matters under the POCA prior to the formation of the CACT, especially where defendants sought assurances that they would be released from the balance of their remaining Commonwealth debt and would therefore avoid the double liability of both proceeds of crime and tax enforcement actions. As our legal obligations preclude us from giving such assurances, settlement discussions stalled and were compromised, in some instances, resulting in the CDPP having to seek alternative outcomes.

15. In October 2006, the *Proceeds of Crime Regulations 2002* were amended to confer status on the ATO as an enforcement agency under the POCA.[2] The conferral of most of the POCA investigative powers on us means that we are obliged to give effect to the objects of the POCA, in addition to our obligations under the taxation laws.

16. To address the difficulties referred to in paragraphs 13 and 14 of this Practice Statement, Division 342 was inserted into Schedule 1 to the *Taxation Administration Act 1953*. These provisions empower the Commissioner to exercise their discretion, in appropriate cases, to waive the right to payment of certain tax-related liabilities in order to facilitate the conduct of proceedings under the POCA.

17. Division 342 is not intended to act as a crediting provision to bring an amount of payment received under the POCA to the tax account, nor to alleviate the notion of double punishment. The object of the Division is to facilitate the starting, conduct and resolution of proceedings under the POCA, and thereby to achieve the objects of the POCA (see paragraph 4 of this Practice Statement) rather than the recovery of tax.

18. Therefore, it is open to us, in appropriate circumstances, to waive all or part of a tax-related liability if the waiver of that tax-related liability would facilitate the proceedings under the POCA. For example, we could waive an amount of a tax-related liability equal to the amount confiscated under the POCA. By way of contrast, in some circumstances it may be appropriate for us to waive an amount of a tax-related liability that exceeds the amount confiscated under the POCA action.

19. Division 342 applies to proceedings under the POCA that:

- start, or propose to start, on or after the commencement of Division 342, or
- started, and have not ended, before the commencement of Division 342.

20. Division 342 applies whether the tax liability was incurred before, on or after the commencement of the Division.

SCOPE

21. The tax assessment process may be implemented at any time while a matter under the POCA is on foot. In some cases, tax assessments may be issued either prior to the instigation of the proceedings under the POCA or during the

[2] Following the repeal of the *Proceeds of Crime Regulations 2002*, section 8 of the *Proceeds of Crime Regulations 2019* continues to confer 'enforcement agency' status on the ATO.

proceedings. In other cases, issue of the tax assessments may be deferred pending finalisation of the proceedings.

22. We may waive the right to payment only after the liability has arisen, but may do so whether or not the liability is due and payable. Consequently, this Practice Statement only applies to cases where the relevant tax-related liability has been raised.

23. Cases where the tax-related liabilities connected with the proceedings under the POCA have not been raised or are incapable of being raised are outside the scope of this Practice Statement.

STATEMENT

24. As a general rule, once proceedings under the POCA have commenced and there is a corresponding tax-related liability (or other pecuniary liability to the Commonwealth that arises directly under a taxation law) on foot, we will take the appropriate steps to ensure that we undertake no action that may prejudice or impede the proceedings under the POCA. In this context, we may decide to:

- defer the time for payment of the associated tax-related liability
- agree to defer recovery of the associated tax-related liability
- remit penalties or interest charges associated with the proceedings under the POCA
- waive the tax-related liability.

25. Through the enactment of Division 342, the Commissioner has been provided with an express power to waive tax-related liabilities in order to facilitate proceedings under the POCA. This power, in combination with existing powers, allows us to manage situations where the Commissioner's obligations to enforce tax laws and facilitate proceedings under the POCA might otherwise come into conflict.

26. You must follow the principles and guidelines outlined in this Practice Statement when exercising the Commissioner's powers under Division 342. It is noted, however, that it is not possible to set out all the circumstances in which the powers may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. You must ensure that the pre-conditions prescribed for the exercise of the powers are met, take care not to consider irrelevant factors and exercise your own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias. Your decisions and actions must be consistent with the commitments we have made in Our Charter. You are also expected to follow Chief Executive Instruction Respecting taxpayers' rights of review (link available internally only).

EXPLANATION

Application of Division 342

Threshold conditions

27. Division 342 makes clear that the Commissioner's power to waive a tax-related liability (or other pecuniary liability to the Commonwealth that arises

directly under a taxation law) only arises where we are satisfied that 2 statutory prerequisites[3] exist:

- the liability is connected with the circumstances associated with the proceedings under the POCA, and
- waiving the liability will facilitate the starting, conduct or ending (by settlement or otherwise) of the proceedings.

Tax-related liability connected with proceedings under the Proceeds of Crime Act 2002

28. The question of whether a tax-related liability is connected with the circumstances associated with proceedings under the POCA needs to be determined by considering all the facts and circumstances of each case.

29. Generally, a tax-related liability is connected with the circumstances associated with the proceedings under the POCA if the liability arose because of activities that could form the basis of proceedings under the POCA. For example, where proceedings under the POCA have been brought in respect of proceeds or benefits derived from alleged tax fraud, the conduct targeted in the proceedings is also likely to give rise to a relevant tax-related liability. Another example would be the earning of income from drug trafficking (which is assessable income but often will not be declared to us).

30. In some matters, the entity that has the tax-related liability may be different to the entity targeted in the proceedings under the POCA (for example, where a company has the tax-related liability but the proceedings under the POCA target a natural person, such as the director). This does not prevent the tax-related liability from being connected with the circumstances associated with the proceedings under the POCA if the underlying conduct is sufficiently connected. A typical example of this type of case is where an individual who conducts business through a corporate structure embarks on phoenix activities, leaving a series of insolvent corporate entities with tax-related liabilities that cannot be recovered. In these cases, the tax-related liabilities will be owed by the corporate entities whereas the proceedings under the POCA may target the individual.

31. Penalties and interest that arise in relation to a tax-related liability are also considered to be connected with the circumstances associated with the proceedings under the POCA. Consequently, the Commissioner may exercise the power to waive such penalties and interest.

32. In circumstances where part of the debt is clearly not connected to the proceedings under the POCA, the Commissioner cannot exercise the power to waive that portion of the tax-related liabilities and will be obliged to continue to pursue its recovery.

33. You should also consider any information supplied by other Commonwealth agencies, such as the AFP or the Australian Criminal Intelligence Commission (ACIC), when exercising this power.

Waiver must facilitate proceedings under the Proceeds of Crime Act 2002

34. We must also be satisfied that waiving the tax-related liability will facilitate the starting, conduct or ending (by settlement or otherwise) of the proceedings under the POCA. It is clear from this wording that it is contemplated that an exercise of the waiver power may be considered and exercised prior to or

[3] Subsection 342-10(1).

during proceedings under the POCA. In particular, the power may be exercised in order to facilitate the resolution of such proceedings.

35. The question of whether waiver will facilitate proceedings under the POCA is one to be considered in light of all the facts and circumstances of each case. In the context of this Practice Statement, it is relevant to have regard to information about the proceedings under the POCA provided by other agencies involved in the proceedings. As a general rule, it is likely that where the conduct which gave rise to the tax-related liability corresponds or overlaps with the conduct being targeted in proceedings under the POCA, waiver may be of assistance in facilitating those proceedings.

36. When having regard to information about the proceedings under the POCA, it is important for us to consider whether the likelihood of a favourable outcome in the proceedings under the POCA sufficiently justifies the exercise of the waiver. This is important because if the proceedings under the POCA fail and we have exercised the waiver, the opportunity to address the taxpayer's conduct via traditional ATO recovery processes will have been lost.

37. It is important that any engagement between us and the relevant proceeds of crime authority (AFP Commissioner or CDPP) regarding potential exercise of the waiver power be undertaken sufficiently early to ensure that if we decide to waive the tax-related liability, it will have the intended effect of facilitating the starting, conduct or ending of the proceedings under the POCA.

38. In cases where we are the investigating agency, there may also be a need to communicate with other internal stakeholders who are involved in the conduct of the case.

39. Given that the power to waive a debt is specifically intended to facilitate the starting, conduct or ending of the proceedings under the POCA, it is relevant to take into account the extent to which the person subject to the proceedings under the POCA chooses to cooperate in the resolution of those proceedings and tax matters. For example, if that person fully contests the proceedings under the POCA, it may not be appropriate for us to waive the tax-related liability connected with the proceedings.

40. Taxpayers or defendants in proceedings under the POCA do not have standing to advise us on whether exercise of the waiver will facilitate the proceedings. The relevant proceeds of crime authority (AFP Commissioner or CDPP) may advise us of this and request the exercise of the waiver. We will then decide whether to exercise the Commissioner's discretion to waive the tax-related liability in accordance with the POCA.

Exercise of power

41. If we are satisfied that the statutory prerequisites have been met, we must then consider the following 2 matters[4] in deciding whether to exercise the discretion to waive the tax-related liability in a particular case:

- the amount the Commonwealth will forgo as a result of the waiver and the time the Commonwealth could reasonably be expected to receive that amount apart from the waiver
- the amount the Commonwealth could reasonably be expected to receive as a result of the proceedings under the POCA and the time the Commonwealth could reasonably be expected to receive that amount.

[4] See subsection 342-10(2).

Amount forgone versus amount expected to be received

42. We are obliged to compare the amount of the tax-related liability proposed to be waived and the amount reasonably expected to be confiscated as a result of the proceedings under the POCA. This requires a practical common sense weighing of all the facts of the case. For example, if the expected recovery under the POCA is only a small amount and the associated tax-related liability is very large, waiver of the full amount of the tax-related liability may not be appropriate.

43. The comparison between the amount forgone and the amount expected to be received needs to be carefully examined on a case-by-case basis without losing sight of the main objective of the law – to facilitate proceedings under the POCA.

Timing of recoveries

44. In addition to amounts collected and forgone, we are required to have regard to the time when the Commonwealth could reasonably be expected to receive payment of a tax-related liability, compared to the time when the Commonwealth could reasonably be expected to receive an amount confiscated in a proceeding under the POCA.

45. In this context, it may be relevant to have regard to the extent to which our traditional civil and administrative recovery remedies have either been exhausted or were not available in the first place.

46. In many circumstances, proceedings under the POCA may represent a more timely recovery mechanism than traditional tax civil enforcement options. For example, where the Commissioner's statutory garnishee powers are not available as a timely tax recovery option.

Other relevant factors

47. In deciding whether to exercise the discretion to waive a tax-related liability, we may take into account any other factor[5] which is relevant in a particular case.

48. One factor which may be relevant in many cases is our prospects of recovery of the liability in the absence of proceedings under the POCA. In many cases, our prospects of recovering a tax-related liability may be significantly lower than the prospects of recovery under the POCA. For example, it may be clear, given the taxpayer's financial circumstances and the value of the assets constituting the asset pool restrained by the CACT and offered towards a settlement, that there is no reasonable prospect of recovering the tax-related liability. As such, a full waiver of the tax-related liability may be appropriate.

49. Some other factors which may be relevant for us to consider include but are not limited to:

- the CACT's assessment of the strength of the available evidence and the likelihood of success if the case under the POCA proceeds
- the seriousness of the defendant's misconduct which gave rise to the alleged offence
- the value of the property (including money and other assets) thought to have been derived by the person as a consequence of the activities

[5] See subsection 342-10(3).

that gave rise to the tax-related liabilities and the proceedings under the POCA

- the total value of the assets potentially subject to confiscation action
- the assets available to the person (including any assets outside Australia)
- any amounts already paid by way of taxes, duties, excise or civil damages
- the interests of third parties in the assets restrained
- the likely cost to the Commonwealth (including legal costs and the commitment of staff and other resources) if the matter proceeds
- the amount of any tax-related liability that is not connected to the proceedings under the POCA and the tax debtor's capacity and willingness to make provision for payment of those debts
- any other individual circumstance or representation made by the tax debtor that may require special consideration (for example, grave illness)
- the level of resources which have been invested by us, the AFP, the ACIC or other Commonwealth agencies in the proceedings under the POCA
- the resources which would be required for us to commence and pursue traditional civil enforcement action and the relative prospects of success of such action.

Circumstances where it may be appropriate to waive a tax-related liability

50. Each case will need to be considered on its own merits having regard to all the relevant circumstances of the case. As a guide only, circumstances where it may be appropriate to waive a tax-related liability include:

- the conduct which gave rise to the tax-related liability corresponds substantially, or at least in part, with the conduct targeted by the proceedings under the POCA
- the tax debtor or their associates have indicated a willingness to settle or consent to the proceedings under the POCA if an assurance is provided in relation to the relevant tax-related liabilities, and these discussions have occurred with us prior to the matter under the POCA being settled
- a proposed resolution of the proceedings under the POCA involves confiscation of all or a significant proportion of the tax debtor's available assets
- the proposed waiver is supported by other relevant Commonwealth agencies, such as the AFP or the ACIC.

Circumstances where it may be inappropriate to waive a tax-related liability

51. There are numerous circumstances where it may be inappropriate to waive a tax-related liability. Therefore, the individual circumstances of each case need

to be assessed. Some of the relevant factors we will consider when deciding not to exercise the discretion to waive a tax-related liability include:

- proceedings under the POCA have not yet been commenced and
  - the tax debtor holds assets in their own right that could be levied in execution should we decide to enforce civil recovery proceedings
  - there is a clear nexus for us to exercise the garnishee powers under section 260-5 to recover the tax-related liability
  - there is no apparent advantage in embarking on proceedings under the POCA
- there are poor prospects of success in the proceedings under the POCA or it is too early to assess the prospects of success
- the proceedings under the POCA were defended and the litigation did not require the facilitation of the proceeding by the waiver of the tax-related liability
- the tax debtor's other taxation obligations are not up to date
- the tax debtor refuses to unwind existing structures which gave rise to the tax mischief associated with the proceedings under the POCA.

Approval of waiver

52. The power to approve a waiver of a tax-related liability is delegated only to certain senior tax officers.

Giving effect to a waiver

53. As a general rule, we may agree to waive a tax-related liability on the understanding that the defendant will meet certain conditions prescribed in consent orders in the proceedings under the POCA or in a deed of settlement associated with the proceedings. In such cases, the waiver will be conditional on all of the conditions prescribed in the orders or deed of settlement being met. Provisions should be made in the orders or deed to ensure that we are not prevented from pursuing recovery of the tax-related liability if the defendant is in default of their obligations under the orders or deed.

54. In some cases, it may be necessary for the Commissioner to be a party to the deed of settlement. Where this is considered necessary, our Settlements team in the Office of the Chief Tax Counsel will settle the requisite inclusions in the deed.

Date issued: 14 April 2011

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Amendment history

10 April 2025

Part	Comment
Throughout	Content checked for technical accuracy. Content checked for consistency with the ATO's Memorandum of Understanding (MOU) with the CACT. Updated in line with current ATO style and accessibility requirements.
Preamble	Preamble updated.
Terms used	Updated current term definitions and added new terms and definitions for 'AFP', 'AFP Commissioner' and 'Commissioner'.
Explanation	Added new paragraphs noting the: • Commissioner's waiver power includes penalties and interest arising in respect of certain tax-related liabilities • risk of exercising the waiver power in circumstances where there is not likely to be a favourable outcome in the proceedings under the POCA • importance of early engagement between the ATO and the relevant proceeds of crime authority to consider the potential exercise of the waiver power • parties who have standing to advise the Commissioner on whether exercise of the waiver power will facilitate the proceedings under the POCA. Updated to reflect the repeal of the *Proceeds of Crime Regulations 2002* and its replacement by the *Proceeds of Crime Regulations 2019*.
Various	Updated to more closely reflect the wording of the: • *Taxation Administration Act 1953* - specified that this waiver is in respect of 'certain' tax-related liabilities and other 'pecuniary liabilities to the Commonwealth that arise directly under a taxation law' • *Proceeds of Crime Act 2002* (POCA) – expanded on the objects of the POCA – amended to use the term 'confiscation' instead of 'recovery' or 'collection' as appropriate – expanded on the concepts of 'confiscation', 'serious offences', 'indictable offences', 'indictable offences of Commonwealth concern', 'property', 'effective control' and 'restraining orders' – specified that the POCA operates to confiscate the 'proceeds, instruments and benefits of crime', and included examples of such benefits of crime.
Various	Updated to more accurately reflect the background of proceeds of crime actions in a tax context (clarified the historical difficulties with effective management and settlement of POCA matters prior to the formation of the

	CACT; clarified the role of the AFP Commissioner and CDPP as proceeds of crime authorities in proceedings under the POCA; clarified the effectiveness of POCA confiscation action in comparison with traditional ATO debt recovery action; clarified the standard of proof required for non-conviction-based confiscation actions; distinguished references to the Commissioner of Taxation and the Commissioner of the AFP).

6 May 2020

Part	Comment
Various	Updated CEI title name.
Other references	Updated Taxpayers' charter link.

28 November 2013

Part	Comment
Various	Revised to meet ATO Style guide requirements. Updated to provide detail of the transfer of the POCA function from the Commonwealth Director of Public Prosecutions to the Criminal Assets Confiscation Taskforce, a Commonwealth multi-agency taskforce created to restrain and confiscate proceeds of crime.

References

Legislative references	TAA 1953 Sch1 260-5 TAA 1953 Sch1 Div 342 TAA 1953 Sch1 342-10(1) TAA 1953 Sch1 342-10(2) TAA 1953 Sch1 342-10(3) Proceeds of Crime Act 2002 Proceeds of Crime Regulations 2002 (repealed) Proceeds of Crime Regulations 2019
Other references	Our Charter Chief Executive Instruction Respecting taxpayers' rights of review (link available internally only)

ATO references

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