PS LA 2011/14 - General debt collection powers and principles

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/14

FOI status: may be released

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.

SUBJECT: **General debt collection powers and principles**

PURPOSE: **This practice statement sets out the:**

- **broad principles underlying our approach to the collection of tax debts**
- **Commissioner's power to defer the time for payment of a tax-related liability and the circumstances in which the Commissioner may exercise that power**
- **Commissioner's power to permit payment of tax-related liabilities by instalments and the circumstances in which payment will be accepted by instalments**
- **circumstances in which the Commissioner will require a taxpayer to provide security in relation to an existing or future liability**

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HOW TO NAVIGATE WITHIN THIS PRACTICE STATEMENT

1. The practice statement is structured under two main parts. The first part provides a general overview of the Commissioner's approach to debt collection.
2. The second part of this practice statement consists of Annexures A to C, which provide detailed guidelines on payment due dates including deferrals, payment arrangements and securities.

TERMS USED

3. The following terms are used in this practice statement:

Additional charges – refers to the specific additional amounts for late payment (including General Interest Charge (GIC) imposed by the various Acts administered by the Commissioner) whenever an amount is not paid by the time for payment.

Deferring the time for payment – means to vary the time at which a tax-related liability becomes due and payable. In a practical sense, such a deferral extends the time for payment of a debt without attracting additional charges for late payment (provided the debt is paid at or before the deferred time). As a result, the debt is no longer due and payable on the original due date, but becomes payable on the date as deferred. It differs from the situation where a debtor is permitted to pay by instalments where additional charges accrue from the original due date. In the latter case, the time at which a tax-related liability becomes due and payable is not varied and interest on any unpaid amount begins to accrue from that time. (See Annexure B 'Payment arrangements').

Guarantee – a binding agreement to satisfy the obligation of another person, if the latter fails to do so.

Payment by instalments or payment over time – means to accept payment of a debt that has not been paid by the original due date, by regular payments over a period of time. The arrangement does not vary the time at which the amount is due and payable. GIC or other relevant penalty for any unpaid amount of liability will accrue from the due date for payment.

Payment time or time for payment – means the time at which an amount of a tax-related liability is, or would become, due and payable.

Security – could be generally described as a possession such that the holder of the security holds, as against the grantor (the taxpayer), a right to resort to some property or some fund for the satisfaction of some demand, after which the balance of the property or fund belongs to the grantor.

Tax debt – a primary tax debt or a secondary tax debt: see section 8AAZA of the *Taxation Administration Act 1953* (TAA).

Tax debtor – see section 8AAZA of the TAA, means:

- in relation to a tax debt – the person of persons who are liable for the tax debt
- in relation to an Running Balance Account (RBA) – the person or persons who are liable for the tax debts that are allocated to the RBA.

Tax-related liability – is a term used to describe any pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable) that is administered by the Commissioner – see subsection 255-1(1) of Schedule 1 to the TAA. It thus encompasses all types of taxes, penalties, additional charges for late payment, (including amounts previously defined under the *Income Tax Assessment Act 1936* as 'tax' and under the *Superannuation Guarantee (Administration) Act 1992* as 'superannuation guarantee charge'). A table which lists the tax-related liabilities is found in section 250-10 of Schedule 1 to the TAA.

STATEMENT

4. Payment of taxes properly payable is an important community responsibility. We expect debtors to pay their taxation debts as and when they fall due for payment. If a debt is not paid when it falls due for payment, we are responsible for collecting it.

5. We use risk management to ensure that our strategies are effective and appropriate for collecting outstanding debts. To ensure that our approach is professional:

   (i) we advise tax debtors of their rights and we respect those rights

   (ii) where a tax debtor fails to respond to our approaches or fails to enter into genuine negotiations, we proceed with appropriate collection action without further notice

   (iii) we adopt the full range of appropriate collection options covered in Law Administration Practice Statement PS LA 2011/18 Enforcement measures used for the collection and recovery of tax related liabilities and other amounts.

6. We expect tax debtors to pay their debts as and when they fall due for payment because:

   (i) we are not a lending institution or a credit provider

   (ii) we expect tax debtors to organise their affairs to ensure payment of tax debts on time

   (iii) we expect tax debtors to give their tax debts equal priority with other debts.

7. Once a tax, duty or charge becomes due and payable the law deems the debt to be due to the Commonwealth and payable to the Commissioner. If a tax debtor does not pay by the due date and does not contact us, we assume they are not going to pay and take whatever action is necessary to recover the debt.

8. When deciding appropriate action to deal with outstanding debts, we consider the compliance history of a taxpayer, including both payment and lodgment records. If we decide to take recovery action, options can include action through the courts or we may use the Commissioner's statutory garnishee power – for details of our garnishee policy refer to PS LA 2011/18.

9. In applying this policy we will assess a tax debtor's capacity to pay their tax debts. In determining their capacity to pay we consider a number of factors including:

   - gross income and expenditure – including consideration of past, current and future transactions, taxable income, exempt income, wealth through inheritances, gifts and windfalls, exclusion of book entries (depreciation, investment allowances, journal entries), the nature of business deductions and the curtailing of excessive personal expenditure, and income alienation
   - access to liquid assets or assets easily convertible to cash (shares, debentures, bonds, personal assets such as jewellery, art)
   - ability to convert fixed assets to cash (sale of home, land, motor vehicle, boats, plant and equipment), and
   - ability to obtain loans/funds – from financial institutions, from family/friends or related entities.

10. We will also consider the factors or circumstances which led to the inability to pay, for example the disposition of funds to a family member at a time when tax obligations arose.

11. If debtors cannot pay a tax debt in full by the due date (or anticipate they will not be able to), they should contact us as early as possible to discuss payment at a later date or by instalments. Note also:

    (i) Company directors may be personally liable to a penalty equal to particular debts of their company that are not paid by the due date.

    (ii) We will not give approval to pay at a later time as a matter of course (refer to Annexure B).

    (iii) The fact that we are negotiating payment of a debt does not prevent us from prosecuting breaches of tax laws nor from seeking to secure the debt by whatever means are available (for example, judgment, security over property, injunctions, issue of 'garnishee' notices) where we have a concern about the risk to the revenue.

    Note that liability to pay outstanding tax is not deferred because of any action to dispute that amount – for details refer to Law Administration Practice Statement PS LA 2011/4 Recovering disputed debt.

12. Where tax debtors face genuine difficulty in meeting payment dates but have capacity to pay, we may allow them to pay their tax debts – and any additional charges for late payment, including the general interest charge (GIC) – by instalments over a reasonable period of time – refer to Annexure B Payment arrangements.

13. If payment of an income tax or fringe benefits tax debt will cause serious hardship, an individual tax debtor can apply for a release from that debt – refer to Law Administration Practice Statement PS LA 2011/17 Debt relief.

14. Where a long-term payment arrangement is offered the risk to revenue will be assessed. We may accept a security to protect the revenue (for example, a registered first mortgage over property). On those occasions, the debtor would be expected to cover the legal costs of the mortgage (see Annexure C).

15. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's powers under sections 255-10, 255-15 or 255-20 of Schedule 1 to the TAA. 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. Tax officers must however ensure that the pre-conditions prescribed for the exercise of the power are met and staff must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

PAYMENT DUE DATES AND DEFERRALS

Purpose

16. This annexure sets out the Commissioner's policy on payment due dates including the Commissioner's power to defer the time for payment of a tax-related liability.

Background

17. Where we make an assessment, we send the taxpayer a notice of assessment stating the amount payable and when payment is due. Where the taxpayer self assesses the tax or charge, the payment is usually due when the lodgment is due.

18. Where we notify a tax debtor of an administrative overpayment, specifying a payment date at least 30 days after we give the notice, the tax debtor is liable to pay the GIC on the unpaid amount from the notified payment date.

19. Where lodgments or tax debts fall due on a weekend or a public holiday, the law extends the due date to the next business day. (Section 8AAZMB of the TAA and section 388-52 in Schedule 1 to the TAA).

20. For the purposes of these provisions, a public holiday includes any day that is a public holiday throughout a state or territory. In these circumstances, all taxpayers receive the benefit of the extension, even if they are not located in the relevant state or territory.

Statement

Demanded due dates

21. We can bring forward the payment time in certain cases if we reasonably believe that the tax debtor may leave Australia before a tax-related debt is due and payable (section 255-20 in Schedule 1 to the TAA).

22. For section 255-20 in Schedule 1 to the TAA to apply, the debtor must have a tax-related debt 'due and payable' in the future. That debt can be one from a notice of assessment we have already sent; or it can be one where we have quantified an amount and propose to send a notice of assessment with a new due date.

23. Section 255-20 in Schedule 1 to the TAA also applies to any tax related liability that becomes payable without an assessment or other notice issuing to the tax debtor – for example, a pay as you go (PAYG) withholding amount payable under Subdivision 16-B in Schedule 1 to the TAA.

24. In all cases where we invoke section 255-20 in Schedule 1 to the TAA, subsection 255-20(2) in Schedule 1 to the TAA requires us to notify the tax debtor in writing that we are bringing the payment date forward.

25. Under this section we may also bring payment forward in cases involving visiting sportsmen, entertainers and other business professionals. We may consider the risk to revenue too great to attempt collection from people living in other tax jurisdictions.

26. We base decisions on bringing payment forward on the level of risk each case presents. In exercising this power we consider the principles detailed in PS LA 2011/18.

27. In some cases we exercise this power in conjunction with the Commissioner's power to prevent a debtor from leaving Australia without discharging, or making arrangements to discharge, a tax debt – we detail these powers in PS LA 2011/18.

Payment deferrals

28. Section 255-10 of Schedule 1 to the TAA enables the Commissioner to defer the time for payment of a tax-related liability having regard to the circumstances of a particular case. The mere existence of that power does not confer upon a debtor any right or entitlement to its exercise.

29. A deferral of the payment time under section 255-10 of Schedule 1 to the TAA varies the time at which the amount is due and payable. Any GIC or other relevant penalty applicable to any unpaid amount of the tax-related liability begins to accrue from the deferred payment time.

30. Deferring the time for payment of a tax-related liability, without the imposition of additional charges for late payment, facilitates collection from debtors who can demonstrate that they are unable to pay by the due date but have the capacity to pay in full at a particular time in the future. It also provides the Commissioner with an alternative to legal action to recover debts not paid by the original due date.

Factors to be taken into account

31. Without limiting the Commissioner's discretion in relation to any particular case, the time for payment will generally not be deferred unless the debtor can demonstrate that:

    (i) payment cannot be (or has not been) made by the original due date because of circumstances beyond their control, and the debtor has taken reasonable steps to mitigate the effects of those circumstances

    (ii) payment in full can be made at a later time, once the circumstances that led to non-payment have been alleviated

    (iii) once the circumstances are under control, continuing tax-related liabilities will be paid as and when they fall due (and accordingly, the debt will not escalate after that time).

32. It is not possible to anticipate every circumstance which may prevent payment by the payment time and which is also beyond the control of a debtor or the debtor's representative (such as the trustee of the debtor's deceased estate). However, it can generally be expected that a deferral will be granted where the debtor can show the inability to pay on time can be directly linked to:

    (i) natural disasters (flood, fire, drought, earthquake and the like)

    (ii) other disasters that may have, or have had, a significant impact on a debtor or region

    (iii) the serious illness of the debtor where there is no other person that can make (or could have made) the payment

    (iv) a legal impediment (such as probate not being granted or access to funds being denied by the order of a Court)

    (v) the embezzlement of the debtor's payment by the tax agent, solicitor or other third party.

33. Such circumstances do not commonly occur and there would be few others that would give rise to a debtor qualifying for a deferral.

34. The Commissioner may grant a collective deferral of time for payment to a class of debtors in a particular industry or region – see subsection 255-10(2A) of Schedule 1 to the TAA. A situation in which the Commissioner may exercise this power is where natural disaster has befallen a particular region and deferral of payment time of tax-related liabilities is granted to all taxpayers in the affected area. The Commissioner's decision to defer in these circumstances will be published on the Australian Taxation Office (ATO) website. A taxpayer is not required to individually apply for a deferral where the Commissioner has granted a blanket deferral.

35. In those situations where individual application for a deferral is made, each request will be considered on its merits. Where a request is granted, the deferred payment time will be determined having regard to the particular circumstances of the debtor and the circumstances that led to the inability to pay on time. The fact that a debtor may have other outstanding debts or a poor compliance record should not prevent that debtor from applying for and being granted a deferral of the time for payment of a particular tax-related liability.

36. It should be noted that in the case where a debtor has entrusted money intended for payment of a tax liability to a tax agent, solicitor or a third party and such money has been misappropriated, the Commissioner may defer the time for payment of the particular tax-related liability, or permit payment to be made by instalments under an arrangement, as circumstances warrant. However, the misappropriation does not alter the fact that the tax liability of that debtor remains undischarged and the Commissioner would not be precluded from taking appropriate action to collect the liability concerned. The exception to this rule is where the payment was made by a cheque drawn in favour of the Commissioner and that cheque has been used for the payment of another debtor's tax-related liability. In such a situation, the Commissioner will usually be obliged to credit the drawer's account to the value of the cheque drawn.

37. The Commissioner will not agree to defer the payment time of any tax-related liability on a permanent basis. Similarly, in the case where a debtor's payment has been misappropriated by another entity, the Commissioner will not extend the deferred payment time indefinitely to await payment which may be expected from the outcome of a successful litigation. A deferral will only be granted to assist the debtor to overcome immediate problems.

38. If the Commissioner defers the time for payment, legal proceedings are unable to be initiated until after the deferred payment time.

39. Action to recover the debt and the additional charges for late payment (calculated from the deferred payment time) may be commenced if a debtor does not pay a tax-related liability by the deferred payment time and does not come to some alternative arrangement for payment of that debt. An alternative arrangement may include a further deferral or may involve the Commissioner accepting payment of the debt by instalments, subject to the imposition of additional charges for late payment from the deferred payment time.

40. Once legal action for collection of the debt has commenced, the time for payment will not be deferred.

Lodgment deferrals and payment consequences

41. Where payment of a tax liability is legislatively linked to lodgment, any deferral of the lodgment date recalculates the payment date. For example, the lodgment of a 2010 individual income tax return is due 31 October 2010 with an expected payment date of 21 November 2010. If granted a lodgment deferral to 30 November 2010, the payment date will be revised to 21 December 2010. The entity does not need to seek a deferral of the payment date unless payment cannot be made by 21 December 2010.

42. The legislative linkage between lodgment and payment does not exist for activity statements and therefore any request for lodgment and payment deferrals for activity statements will need to be considered independently.

43. There will be cases where it is not appropriate to defer the due date for lodgment but it may be appropriate to defer the due date for payment. An inability to pay by the due date is not a valid reason for failing to lodge on time.

44. Alternatively, there will be circumstances, such as the situation where payment can be made but lodgment information is not yet available, where it is appropriate to defer the due date for lodgment but not payment.

45. If the lodgment due date is deferred it may also be appropriate to defer the payment date. In such cases, provided lodgment and payment are made by the deferred due date, no penalties will apply for failure to lodge on time and no general interest charge will apply for failure to pay on time.

Transfer pricing cases

46. In cases where the Commissioner makes a transfer pricing or profit reallocation adjustment, the debtor may seek Competent Authority assistance under the Mutual Agreement Procedure (MAP) article contained in Australia's double tax agreements in an attempt to have the matter resolved with the other tax jurisdiction involved. For further information refer to Taxation Ruling TR 2000/16.

47. It is recognised that the collection of tax during the MAP will in most instances impose double taxation on the taxpayer because the same profits have been subject to tax in both jurisdictions. A request to defer the payment time until the MAP process is complete will be declined as the Commissioner's power to defer recovery action under section 255-5 of Schedule 1 of the TAA provides an alternate and more appropriate remedy for such circumstances.

48. As such, the Commissioner will agree to defer recovery action under section 255-5 of Schedule 1 to the TAA until an agreed future date, which is usually the date that the MAP process is concluded, unless:

   (i) there is a risk to revenue, or

   (ii) the taxpayer has other liabilities unpaid after the due date, or

   (iii) the taxpayer has failed to meet other tax obligations when required.

Advice to taxpayer

49. In all cases where it has been decided to defer the payment time of any tax-related liability, the debtor will be advised in writing:

(i) of the debt(s) to which the deferral applies

(ii) of the deferred payment time by which payment is to be made and from which additional charges for late payment will be calculated

(iii) that the decision to defer the payment time is to specifically alleviate the difficulties caused by particular circumstances and is not a permanent deferral

(iv) that future liabilities are to be paid as and when they fall due (such that the debt does not escalate)

(v) that additional charges continue to apply in relation to any other outstanding debt which is not the subject of the application to defer the time for payment

(vi) that action to recover will be commenced without further notice if payment is not made by the deferred payment time and if alternative arrangements for payment have not been made.

PAYMENT ARRANGEMENTS

Purpose

50. To detail the Commissioner's approach to considering and permitting taxpayers to pay debts by instalments.

Background

51. Taxpayers have a responsibility to manage their cash flow to ensure they meet all their tax debts when those debts fall due for payment. Some taxpayers may experience cash flow difficulties that will prevent them from paying their debt on time. In those instances the Commissioner will consider requests to accept payment of the debt by instalments over a period of time. Accepting payment by instalments provides the Commissioner with an alternative to more formal recovery procedures.

52. Section 255-15 of Schedule 1 to the TAA gives the Commissioner the power to permit taxpayers to pay an amount of a tax-related liability by instalments under an arrangement – whether or not the liability has already arisen.

53. An arrangement under section 255-15 of Schedule 1 to the TAA does not vary the time at which the amount is due and payable. Any GIC, if applicable, in respect of any unpaid amount of the tax-related liability, begins to accrue when the liability is due and payable under the relevant taxation law, or at the time as varied under sections 255-10 or 255-20 of Schedule 1 to the TAA.

54. The Commissioner will not agree to accept payment by instalments as a matter of course. Any decision to enter into an arrangement to accept payment by instalments will be made in accordance with the risk management guidelines set out in Law Administration Practice Statement PS LA 2011/6 Risk and risk management in the ATO. The compliance model clearly links risk with the indicators of unwillingness to comply with taxation obligations. Concessions are unlikely to be granted to those who continually fail to pay or meet their lodgment obligations on time.

55. The individual circumstances of the taxpayer will be considered in each case, including consideration of any steps taken or proposed to be taken by the taxpayer to mitigate the risk. The Commissioner will also consider the taxpayer's past behaviour and reasons for any previous non-compliance. Relevant considerations are outlined at paragraph 59 of this practice statement).

56. A decision to accept payment of a debt by instalments may be made by the Commissioner having due regard to the information provided by debtors. Consideration will be given to any advice from financial advisers whom taxpayers have engaged to assist in sorting out their financial affairs, but this does not relieve them from the responsibility for providing other relevant information to the Commissioner. Taxpayers cannot impose conditions on the Commissioner and if they do not provide sufficient information to support their application to pay by instalments the Commissioner will generally not agree to the request.

Application process

57. Responsibility for demonstrating that payment cannot be made by the due date rests solely with the taxpayer. A taxpayer who cannot pay on time should apply for an arrangement to pay by instalments before that due date has passed. If an application cannot be made by the due date, the taxpayer should apply as soon as possible after the due date.

58. Taxpayers applying to pay their debts by instalments must provide all necessary information within agreed timeframes to enable the Commissioner to give proper consideration to the request. If they do not provide the required information within the agreed timeframe, they will be advised that action to recover their debts may be initiated (or continued) without further warning.

59. An application to pay by instalments should:

(i) explain the reasons for non-payment by the due date

(ii) satisfy the Commissioner as to the taxpayer's inability to pay the full amount by the due date (as opposed to providing reasons why they have decided to not pay by the due date)

(iii) contain a detailed statement of the taxpayer's current financial position (including details of what steps have been taken to obtain funds to pay the debt and what arrangements are in place to pay other creditors)

(iv) satisfy the Commissioner that, generally, the taxpayer is treating their tax debts with the same priority they are giving to their other payment obligations (for example, they would need to show that payment of private debts, like credit card debts and mortgage obligations, have not assumed a priority over payment of their tax debts and that any short-term priority afforded to their business debts was appropriate and that the business was viable)

(v) include a detailed proposal for payment of their debt in full in the shortest possible timeframe

(vi) incorporate additional charges for late payment and reimbursement for any costs incurred pursuant to any recovery action that the Commissioner had commenced in respect of the debt

(vii) contain sufficient information to satisfy the Commissioner that payment can be made by instalments without the total debt escalating. (Taxpayers will need to specify the steps they have taken to ensure that future debts will be met as and when they fall due)

(viii) be accompanied by an initial payment to the extent of the taxpayer's present capacity as a sign of their genuine commitment to pay.

Factors to be taken into account

60. Without limiting the Commissioner's discretion in relation to a particular case, the following factors will be taken into account in determining whether to accept payment by instalments:

(i) the information provided by the taxpayer and other information that may be held (or obtained) by the Commissioner

(ii) the circumstances that led to the inability to pay

(iii) the taxpayer's current financial position, including other current payment obligations and actions taken by the taxpayer to rearrange finances or borrow to meet the debt

(iv) the stage that any legal recovery action has reached and any grounds offered by the taxpayer to justify a request that further legal action be deferred

(v) the offer made and the ability to meet payment of the debt (and the additional charges for late payment imposed by legislation) on those terms without seriously impacting on the taxpayer's ability to meet other obligations

(vi) whether there is a likely risk to the revenue by accepting payment by instalments and whether that risk could be overcome by seeking some form of security for the debt from the taxpayer (see below at Annexure C).

(vii) the solvency of the taxpayer and arrangements made with other creditors (arm's length or otherwise) to pay debts

(viii) compliance with other taxation obligations or commitments (for example, whether all lodgment obligations including activity statements (BAS/IAS) are up to date) and the history of the taxpayer's prior dealings with the Commissioner

(ix) whether there are alternative collection options that may result in payment in a shorter timeframe (for example, the use of garnishee provisions)

(x) the willingness of the taxpayer to enter into direct debit arrangements if that facility exists, and

(xi) the willingness of the taxpayer to accept the conditions under which the Commissioner will agree to a payment arrangement.

RBA deficit debt

61. Where the outstanding debt is a RBA deficit debt, the Commissioner will usually consider an application for an arrangement to pay by instalments based on the RBA deficit debt rather than on each of the individual component tax debts that contribute to that balance. The nature of an RBA deficit debt is discussed Law Administration Practice Statement PS LA 2011/22 Refunds of running balance account surpluses and credits - Commissioner's discretion to retain amounts.

Risk analysis

62. Payment by instalments will not be accepted if prospects of recovery in the longer term would be diminished or the revenue would be disadvantaged. If there is insufficient information to enable the Commissioner to make a decision, taxpayers will be advised that the offer is unacceptable and formal action to recover the debt will be instituted or will continue. Where the Commissioner has concerns about the solvency of taxpayers, or their ability to meet the terms proposed, they may be required to provide adequate security or a surety. See Annexure C.

63. Taxpayers paying by instalments are expected to finalise their debts in the shortest possible timeframe. However, the Commissioner acknowledges there will be instances where that timeframe may extend beyond one, two or more financial years depending on factors such as the ability to pay, the size of the debt and the likely costs of alternative collection activity. In these circumstances, the taxpayer may be required to provide security or a surety. The arrangement will also be reviewed regularly to take into account potential changes to the taxpayer's financial situation.

64. In some cases, where it is considered appropriate based on an analysis of the associated risk (see PS LA 2011/18), the Commissioner may accept an arrangement to pay by instalments without immediately deferring legal action. For example, the Commissioner may require execution of judgment or that the taxpayer consent to judgment as a precondition of the arrangement to pay by instalments.

Terms and conditions of arrangement

65. Taxpayers will be advised in writing of the details of the payment arrangement (that is, what is expected from them) if it is decided to accept payment by instalments. They will also be advised of the likely consequences if they fail to pay as required under the payment arrangement (or fail to come to some alternative arrangement for payment that is acceptable to the Commissioner). Taxpayers are expected to make payments in accordance with their payment proposals while the Commissioner is assessing that proposal.

66. Arrangements to accept payment of a debt by instalments will stipulate that GIC imposed by legislation applies from the original due date of the liabilities and will continue to accrue while the debt remains outstanding. If possible, taxpayers will be provided with an indication of the likely quantum of interest they will be required to pay under the arrangement. Taxpayers seeking a remission of GIC will have to demonstrate that remission is warranted (see Law Administration Practice Statement PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability).

67. If the taxpayer does not meet a term of the arrangement, action to recover the whole of the outstanding debt may be initiated (or continued) without further warning. Taxpayers are expected to acknowledge the debt and, if legal proceedings have commenced or are about to commence, consent to the Commissioner being granted judgment in the event of any default in payment.

68. The terms of the arrangement should not inhibit recovery action if there are indications of risk to the revenue, preferential payments or a significant change in a taxpayer's circumstances. Where a significant change in the taxpayer's circumstances occurs, the Commissioner may, having regard to any representations that have been made by the taxpayer, vary the terms of the arrangement or proceed to recover the debt in full (see paragraphs 72 and 73 of this practice statement).

69. The Commissioner may require taxpayers to accept the condition that it will allocate payments to outstanding tax in an order that is in the best interests of the Commonwealth (see Law Administration Practice Statement PS LA 2011/20 Payment and credit allocation). When allocating payment to outstanding tax, the Commissioner will give consideration to a number of matters including the nature of the tax types, the differing age of debts, the remedies open to the Commissioner to collect those debts, and the stage reached in legal proceedings for any part of the debt.

70. If a taxpayer is not prepared to agree to the terms put forward by the Commissioner, then formal legal action to recover the debt may be commenced or continued without further warning.

Commissioner's discretion to offset

71. By law, the Commissioner must offset all credits, payments or RBA surpluses against any taxation debts. However the Commissioner has a discretion not to offset in the limited circumstances specified in subsection 8AAZL(3) of the TAA. This includes situations where the tax debt is the subject of an arrangement to pay by instalments, and the taxpayer is complying with the terms of that arrangement (paragraph 8AAZL(3)(b) of the TAA). If the taxpayer is complying with the terms of an arrangement to pay by instalments, the ATO will exercise the Commissioner's discretion not to offset where it is fair and reasonable to do so (see Law Administration Practice Statement PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts).

72. Taxpayers will generally be advised at the time of payment negotiations that offsets will occur, and this will be confirmed in writing.

Termination of arrangement

73. The Commissioner may terminate any arrangement to accept payment by instalments and commence (or continue) action to recover the whole of the outstanding debt if:

   (i) it is established that the information provided by the taxpayer and upon which the decision was based was false or misleading

   (ii) the taxpayer does not pay the instalments as required

   (iii) the taxpayer fails to comply with subsequent lodgment and payment obligations for the duration of the arrangement, or

   (iv) the taxpayer's circumstances change and the Commissioner forms the view that the payment arrangement should be terminated rather than varied.

74. Action to recover the debt and the additional charges for late payment (calculated from the original due date) will commence if a taxpayer does not make a payment instalment by the agreed date or contravenes the arrangement in any way and does not come to some alternatively acceptable arrangement for payment of that debt.

SECURITIES

Purpose

75. This annexure discusses the circumstances in which the Commissioner will require a taxpayer to provide security in relation to an existing or future liability.

76. The first part examines securities in general: the circumstances in which the Commissioner may require a security, the kinds of security which the Commissioner considers acceptable; and how the security arrangement may be executed. It examines general considerations that may be taken into account when security is offered voluntarily by a taxpayer, including cases in which it is provided as a pre-condition to agreeing to defer the time for payment of a debt, agreeing to permit payment of a debt by instalments or agreeing to issue a departure authorisation certificate.

77. The second part examines the provision of securities under a formal requirement by the Commissioner pursuant to Subdivision 255-D in Schedule 1 to the TAA and the way in which the provisions under this Subdivision will be administered by the Commissioner. While some of the considerations outlined in the first part of the policy relating generally to securities are also relevant to the exercise of the power under Subdivision 255-D, there are specific requirements in this legislation that are considered in this part of the practice statement.

(Please note: the policy does not apply to licensing securities obtained in relation to the *Excise Act 1901*.)

Background

78. Security involves a transaction where a creditor is given rights that can be exercised against some property of the taxpayer or a third party in the event the taxpayer does not pay. The advantages of obtaining a security are:

- it reinforces the Commissioner's prospects of ultimate recovery of the debt (that is, the risk of non-payment is mitigated)
- it provides an incentive for a taxpayer to ensure that all possible steps are taken to finalise any review and appeal processes, and any other arrangements for the payment of tax
- it allows taxpayers to retain a disputed amount pending completion of the review process
- it prevents taxpayers from divesting themselves of assets while a debt remains outstanding
- it protects the Commissioner's position during court disputes.

79. In some cases, it may be appropriate for the Commissioner to obtain the best security available in order to make certain its position as creditor, or more importantly, to secure the process of debt collection. The Commissioner may seek to obtain security in cases where:

- a taxpayer requests the Commissioner defer the time for payment of a debt – see Annexure A Payment Due Dates and Deferrals
- a taxpayer is seeking to pay a debt by instalments
- the Commissioner has reason to believe the taxpayer intends to carry on business for a limited period only (see the discussion of Subdivision 255-D in paragraph 82 of this practice statement)

- the taxpayer admits they are temporarily unable to pay the taxation debts
- a debt is subject to dispute and an arrangement has been made with the Commissioner in accordance with PS LA 2011/4
- the taxpayer appears to be dissipating assets
- the taxpayer wishes to leave Australia but is not in a position to pay the debt before leaving
- the taxpayer is seeking a departure authorisation certificate from the Commissioner
- there is any other indication that the revenue may be at risk.

80. Securities may take any number of forms, for example, a mortgage over land, a charge over a company's assets (which may be fixed or floating) or a guarantee by a third party. Basically, securities may be given over any type of property unless excluded by statute. (An example of statutory exclusion is the prohibition of a charge over superannuation benefits covered by Superannuation Industry (Supervision) Regulations 1994 subregulation 13.13). Depending on the circumstances of the case it will not always be desirable or practical to take some forms of security. (See paragraphs 91 and 92 of this practice statement which identify the securities the Commissioner prefers.)

81. The Commissioner maintains a register of all securities received and issues a receipt for each security as required by Financial Management and Accountability Regulations 1997 regulation 20.

Securities under Subdivision 255-D in Schedule 1 to the TAA

82. The Commissioner can require security from a taxpayer under Subdivision 255-D in Schedule 1 to the TAA in situations where:

- the Commissioner has reason to believe that the taxpayer is carrying on an enterprise in Australia and intends to carry on that enterprise for a limited time only, or
- the Commissioner reasonably believes that the requirement is otherwise appropriate, having regard to all relevant circumstances.

Security can be requested at any time that the Commissioner reasonably believes is appropriate and as often as the Commissioner reasonably believes is appropriate. The security can be required for either an existing or future tax-related liability.

Requirement to give notice

83. When requesting a taxpayer to give security for an existing or future tax liability under section 255-100 in Schedule 1 to the TAA, the Commissioner is required to give notice in writing to the taxpayer (security notice).

84. The security notice must be served on the taxpayer and must:

- state that the taxpayer is required to give the security to the Commissioner
- explain why the Commissioner requires the security
- set out the amount of the security

- describe the means by which the taxpayer is required to give the security under subsection 255-100(2) of Schedule 1 to the TAA
- specify the time by which the taxpayer is required to give the security; and explain how the taxpayer may have the Commissioner's decision to require security reviewed.

85. A taxpayer from whom security is requested has right of review under the *Administrative Decisions (Judicial Review) Act 1977*.

86. Failure by a taxpayer to provide security as requested by the Commissioner is a criminal offence.

Statement

87. Where a security is offered, the taxpayer should be advised that:

- The security is to be located in Australia, be of ascertainable value and be over property in a form acceptable to the Commissioner (see paragraphs 91 and 92 of this practice statement).
- The security is to be supported by an agreement or deed which should set out the purpose of taking security, when and what triggers default (for example, a breach of a payment arrangement). The terms of the deed may include but are not limited to the following:
  - (i) All costs in maintaining the security property including rates, taxes and other charges are payable by the person offering the security.
  - (ii) Any property must be insured at the taxpayer's expense showing the Commonwealth's interest in the property (including the nature of that interest, for example as a mortgagee) for the full insurable value on a replacement and reinstatement basis. If the property is owned by the Owners Corporation – a strata title – the property must be insured by the Owners' Corporation. We may also require the taxpayer to obtain mortgagee insurance in respect of the mortgage.
  - (iii) The agreement or deed will provide for the Commissioner to realise the security should default occur.
  - (iv) The Commissioner's costs in taking the security (including solicitor's fees, valuation costs (if any) and registration and stamping fees) are to be met by the taxpayer at the time of the taking of the security.
  - (v) The Commissioner's costs in realising the security in the event of default are to be met by the taxpayer.
- Additional charges for late payment will continue to accrue, unless the taxpayer's circumstances qualify for remission under normal remission guidelines: see PS LA 2011/12.

88. A security is normally for a current debt but a security arrangement may be entered into to meet future debts that may arise for example, from non-payment of a business activity statement or other liabilities. The amount reflected in the security should be for a specific amount (so there is no uncertainty in law) and is to include the tax debt plus estimated additional charges for late payment, until the debt is fully paid.

89. In some cases, the Commissioner will require a taxpayer to provide 'adequate' security as a pre-condition to agreeing to defer the time for payment of a tax debt, agreeing to permit payment of a tax debt by instalments or agreeing to issue a departure authorisation certificate. The Commissioner will determine what is 'adequate' having regard to the particular circumstances.

90. In deciding whether to take or require security the Commissioner may have regard to (but is not limited to) the following considerations:

- the quantum of the debt
- the nature of the security being offered. This includes the location of the property or asset, the expectation it can be readily and easily realised if default occurs, the taxpayer's equity in the security, the value of the security and how the value has been determined (that is, the basis of any valuation)
- if third party security is offered, whether the third party is solvent and if it is fair and reasonable to take the security
- the value of security compared to the amount of the tax debt outstanding or the amount expected to be outstanding when any outstanding objection or appeal is finally determined)
- the period of time the debt has been outstanding
- the taxpayer's past compliance history
- the taxpayer's ability to pay, based on available information (either supplied by the taxpayer or otherwise available to the Commissioner)
- the level of the taxpayer's other liabilities
- arrangements made by the taxpayer's other creditors to secure their debts.

Types of security

91. The most common securities are:

(i) a registered first mortgage from the taxpayer or a third party, over freehold property

(ii) a registered second or subsequent mortgage from the taxpayer or a third party, over freehold property where there is sufficient equity in the property to secure the tax debt whilst ceding priority to the first or prior mortgagees

(iii) an unconditional bank guarantee from an Australian bank acceptable to the Commissioner (unconditional means the bank pays the Commissioner upon demand)

(iv) personal guarantees (supported by a registered mortgage over freehold property), and

(v) a fixed and floating charge over a company's assets.

The preferred securities are those shown at (i), (ii) and (iii) above.

92. Securities can be provided by the taxpayer alone, in combination with others or by a third party alone. An agreement by the taxpayer, either to do something or not to do something (for example, not to dissipate assets), sometimes called a negative pledge is not a security.

Default by taxpayer

93. If a taxpayer defaults on the agreement, the Commissioner will take appropriate action. This may include:

- allowing the agreement to continue (the costs incurred to vary the existing documentation, including the Commissioner's solicitor's costs, will be borne by the taxpayer)
- advising the taxpayer to pay the tax covered by the security otherwise action will be taken to enforce the security, and
- enforcing the security.

Securities under Subdivision 255-D in Schedule 1 to the TAA

94. The Commissioner must consider all relevant matters and act reasonably, and comply with the general principles of administrative law, in deciding:

- whether, and how often, to request security
- how much security to require a taxpayer to provide
- what kind of security to accept
- how much time is given to the taxpayer to comply with the demand for security.

95. The Commissioner's decisions in exercising his powers under Subdivision 255-D in Schedule 1 to the TAA are administrative in nature and reviewable by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977.*

Deciding whether to request security

Temporary enterprise

96. Security may be requested from a taxpayer if there is reason to believe that the taxpayer is establishing or carrying on an enterprise in Australia for a limited time only.

97. A security notice may be issued in such cases to secure the payment of tax debts which have been or which may be incurred by the taxpayer in conducting that enterprise.

98. Before issuing a security notice, it is necessary to consider all the relevant facts and circumstances of the case in question in order to determine if there are grounds to support a belief that:

- the taxpayer is establishing or carrying on an enterprise; and
- the taxpayer intends to carry on the enterprise for a limited time.

99. Without limiting the matters that can be considered, it may be relevant in deciding if the taxpayer intends to carry on the enterprise for a limited time to consider:

- the nature of the enterprise
- any previous enterprises in which the taxpayer, or a related entity of the taxpayer, has been involved
- whether the taxpayer is a non-resident

- any evidence which may indicate that the taxpayer intends to leave Australia without returning
- the amount of any current tax-related liability or the expected amount of any future tax-related liability
- the taxpayer's ability to pay, based on available information, and
- the taxpayer's assets in Australia.

100. In deciding whether to request security under this provision regard must be had to the relevant facts and circumstances of each taxpayer. The Commissioner may have regard to (but is not limited to) the following considerations:

- the nature of the enterprise
- the expected duration of the enterprise
- the nature and amount of any current tax-related liability, and/or the nature and amount of any future tax-related liability expected to be, incurred by the taxpayer in carrying on the enterprise
- the taxpayer's ability to pay its current tax-related liability or the expected amount of any future tax-related liability, based on available information
- the period of time any tax-related liability has been outstanding
- the compliance and payment history of the taxpayer, both in respect of the current enterprise, as well as any previous enterprises in which it has been involved
- the level of the taxpayer's other liabilities.

Where otherwise appropriate

101. The Commissioner is empowered to request security from a taxpayer where he reasonably believes, having regard to all relevant circumstances, that the provision of security is otherwise appropriate.

102. In deciding whether and how often to request security under this provision, the Commissioner will take into account relevant facts and circumstances.

103. Relevant factors may include the following:

- the amount of any current tax-related liability or the expected amount of any future tax-related liability
- the period of time the debt has been outstanding
- the taxpayer's ability to pay its current tax-related liability or the expected amount of any future tax-related liability, based on available information
- the level of the taxpayer's other liabilities
- the impact of arrangements made by the taxpayer's other creditors to secure their debts, if known.

(Some of these factors were already mentioned in paragraph 90 of this practice statement.)

104. Additional care should be exercised in circumstances where no tax-related liability exists at the time when the issuing of a security notice is being considered. Generally, a notice should not be issued in such circumstances unless there are reasonable grounds to believe both that a future liability will arise against that entity, and that there is a risk that this liability will not be satisfied in the absence of the security.

105. In addition, the Commissioner will have regard to the following considerations, where relevant:

- **The taxpayer's payment history**

  The Commissioner may consider the history of tax debts accrued by the taxpayer or by the businesses or activities in which they were involved; the nature and extent of those debts; and the manner in which they arose. For example, security may be requested if it is evident that the taxpayer has a history of consistent non-compliance with paying previous liabilities. It may also be relevant to consider the nature of the business or activity in which the taxpayer is currently engaged.

- **The payment history of directors of a corporate taxpayer, and trustees of trusts**

  In the case of companies it may also be relevant to have regard to the current and previous conduct of those individuals who control the company's activities (for example, the directors of the company, or the directors of other companies which have effective control over the relevant entity).

  For example, this may be a relevant consideration where the individuals who control the company have a history of involvement in 'phoenix' arrangements. In such situations the conduct and the compliance history of the directors of both dissolved and newly-established companies, and of the controlling companies of these entities, may be relevant considerations in deciding whether to issue a notice.

  Similarly, where relevant, in deciding to issue a security notice the Commissioner will consider the compliance history of trustees (and of directors of corporate trustees):

  - in their capacity as trustees of the particular trust
  - in their capacity as trustees of other trusts, both current and previous, and
  - in their non-trustee capacity.

- **Where the Commissioner is granting the taxpayer the benefit of a payment arrangement**

  The Commissioner may require a taxpayer to provide security as a precondition of entering into a payment arrangement for the payment of liabilities by instalments. It is expected that this will not require the issue of a security notice.

The Commissioner may nonetheless issue a security notice in connection with an existing payment arrangement. For example, it may be appropriate to issue a security notice in the following situations.

- The payment arrangement had been entered into without the provision of security, but it is now considered on reasonable grounds that the relevant risk of default has increased. This could occur where the Commissioner has reasonable grounds to believe that asset dissipation by the taxpayer has occurred or is likely to occur.
- Security which had been provided with the payment arrangement is considered on reasonable grounds to no longer be of sufficient value to meet the outstanding debt. This may be, for example, due to a fall in the value of the security originally provided.

- **Where there is evidence of asset dissipation**

  On the facts in a particular case there is evidence that the taxpayer's assets are being dissipated.

Amount of security required

106. In deciding how much security to require from a taxpayer, the Commissioner will consider all relevant facts and circumstances pertaining to the matter in question, including the following:

- **The amount of the current tax-related liability, or the expected amount of the future tax-related liability**

  The Commissioner may require security to the value of the existing or anticipated tax-related liabilities, or to the value of a portion of those liabilities. Generally, regard should be had to the taxpayer's ability to provide that security.

  Where there is both an existing tax-related liability as well as an anticipated tax-related liability security may be required from the taxpayer that equals the amount of both the current and expected liabilities. This may be the case, for example, where there are reasonable grounds to believe that an anticipated tax-related liability is unlikely to be met by the taxpayer at the time in which it becomes due and payable.

  The extent to which future tax liabilities of an entity may be anticipated by the Commissioner will depend on the relevant circumstances of each case, including (but not limited to) the following:

  - the nature of the business or activity in which the taxpayer is engaged
  - the size of the taxpayer's business
  - the number of employees in the business
  - the type of tax debt incurred, or expected to be incurred
  - the nature and extent of the debts incurred by the businesses or activities in which the taxpayer was previously engaged and the taxpayer's tax compliance and payment history.

The Commissioner may, for example, have a reasonable basis upon which to expect that the entity will incur an income tax debt in a particular amount for the current income year; or a pay as you go withholding debt for several periods in an income year. An estimation of this liability may be based on information relating to the taxpayer's business.

In anticipating tax liabilities likely to be incurred by the taxpayer, the Commissioner may consider the likely changes either in the general economic environment or in circumstances relevant to the conduct and operation of the taxpayer's business. Accordingly, it may not always be possible to anticipate amounts of future tax-related liabilities with the necessary degree of precision, particularly over a long period of time. The longer the period of time in respect of which the liabilities are to be anticipated the greater the chance that unforeseeable events may occur that will materially affect the conduct and operations of the taxpayer's business.

Note in this regard that the Commissioner may request further security as often as it reasonably believes is appropriate. Therefore the Commissioner may choose to issue a security notice covering tax debts that can reasonably be expected to be incurred over a particular period, and issue a subsequent notice in respect of that period, or a subsequent period, for further liabilities that have become reasonably predictable.

The Commissioner may not consider it practical or desirable to adopt the approach of issuing multiple security notices in succession covering short periods of immediately foreseeable liability, particularly where there appears to be evidence of a significant risk of asset dissipation. (Refer also to the subheading 'Other considerations' below).

By contrast, the Commissioner may consider it appropriate to request security only for a portion of the existing or anticipated liability, notwithstanding that the quantum of the full debt amount may be established or reasonably ascertainable. Again this decision will be made on all relevant facts and considerations in respect of the particular matter.

- **Other considerations**

  There may be a range of other factors relevant to a decision of how much security to require from an entity. The Commissioner may take account of any relevant information available to it when making a decision in this regard.

  For example, the Commissioner may in appropriate instances require a larger amount of security from the taxpayer than in other circumstances where there is: evidence of a real risk of asset dissipation, evidence of a rapidly escalating debt; or evidence of both.

What kind of security to accept

107. Paragraphs 91 and 92 of this practice statement describe the types of security that are acceptable to the Commissioner.

108. A security notice issued to a taxpayer may prescribe a specific type or types of security that must be provided by the taxpayer in satisfaction of the request. The Commissioner will have regard to the taxpayer's circumstances in determining what security is sought. The Commissioner will not require a taxpayer to provide a type of security that cannot reasonably be expected to be provided by that taxpayer. In most cases, the Commissioner will prescribe a range of security types in the notice issued to the taxpayer, so as to allow the taxpayer some flexibility in satisfying the request.

109. However there may be cases in which the security notice requires a particular type of security from a taxpayer. This may be necessary, for example, where there is evidence of asset dissipation.

110. In order to satisfy the security notice requirements, the taxpayer must provide security of the kind and in the amount specified by the Commissioner. The Commissioner may reject an offer of security that does not meet these requirements. Note that the taxpayer may be liable for an offence for failure to comply with the notice if an acceptable security is not provided within the timeframe stipulated in the notice.

111. Regard should be had to any equity that the debtor, or the third party, has in the various assets over which the security is being sought.

Time allowed for the provision of security

112. A security notice issued to the taxpayer must prescribe the time by which the taxpayer is required to provide the security.

113. The Commissioner will prescribe a reasonable amount of time for the taxpayer to comply with the notice. The amount of time considered reasonable for the satisfaction of the notice will vary from case to case, and depends on the circumstances pertaining to each matter.

114. In this respect, the Commissioner must have regard to all relevant circumstances in prescribing the time within which the notice requirements must be met.

115. This may include consideration of the following factors:

- the risk of asset dissipation
- the amount of security required from the taxpayer
- the type of tax liabilities covered by the security
- the type of security to be provided by the taxpayer
- whether the asset is owned directly or indirectly by the taxpayer.

116. Security is 'provided' once all the transactions necessary to give the Commissioner rights that can be exercised against the taxpayer's property have been completed.

117. In some cases, the security required by the Commissioner may need to be supported by an executed agreement or deed or various other documents (for example, a registered mortgage).

118. Security will only be considered to have been 'provided' by the due date in the notice if all such necessary documents have been executed and all necessary processes concluded by the required date.

119. The taxpayer will be liable for penalties for failure to provide the required security by the due date. However, the Commissioner may extend the time for compliance with the notice provided that the taxpayer has requested an extension of time from the Commissioner within the period nominated in the notice. The time should only be extended in those cases where it is consider reasonable to do so after having considered all relevant facts and circumstances.

Failure to provide security

120. A taxpayer will commit an offence if they fail to provide security to the Commissioner as required in the notice.

121. The penalty for this offence is 100 penalty units in the case of individuals and may be as high as 500 penalty units for corporate entities.

Default by the taxpayer

122. The general legal principles that apply to security arrangements govern the Commissioner's ability to exercise rights over the security. The exercise of the Commissioner's rights depends on the specific situation, taking into account factors such as the nature of the liabilities covered by the security and the reason why the security was requested and the precise wording of the agreement or deed under which the security is provided.

123. The security required by the security notice is not a tax or a withholding obligation. The enforcement of the security is not subject to the general collection and recovery rules that apply to tax-related liabilities. For example, a failure to comply with the security notice will not itself attract GIC. That is, the general interest charge is not imposed separately on the amount of the security required under the security notice, instead, GIC, where applicable, will be applied to the particular outstanding tax-related liabilities in respect of which a security notice is issued.

Subject references	Garnishees Disputed debts General interest charge Risk management
Legislative references	TAA 1953 8AAZA TAA 1953 8AAZL(3) TAA 1953 8AAZMB TAA 1953 Sch 1 255-5 TAA 1953 Sch 1 255-10 TAA 1953 Sch 1 255-10(2A) TAA 1953 Sch 1 255-15 TAA 1953 Sch 1 255-20 TAA 1953 Sch 1 255-20(2) TAA 1953 Sch 1 Subdiv 255-D TAA 1953 Sch 1 255-100 TAA 1953 Sch 1 255-1(1) TAA 1953 Sch 1 388-52 ADJR 1977 FMA Regulations 1997 20 Superannuation Industry (Supervision) Regulations 1994 13.13
Related public rulings	TR 2000/16
Related practice statements	PS LA 2011/4 Recovering disputed debts PS LA 2011/6 Risk and risk management in the ATO PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability PS LA 2011/17 Debt relief PS LA 2011/18 Enforcement measures used for the collection and recovery of tax related liabilities and other amounts PS LA 2011/20 Payment and credit allocation PS LA 2011/22 Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts
Date issued	14 April 2011
Date of effect	14 April 2011
Contact email	OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au
Section	Operational Policy, Assurance and Law